REGENT UNIVERSITY LAW REVIEW

ARTICLES

STARE DECISIS, SETTLED PRECEDENT, AND *ROE V. WADE*: AN INTRODUCTION

Clarke D. Forsythe & Regina Maitlen

NEUTRALIZING STATE CONSTITUTIONS AS A SOURCE OF ABORTION RIGHTS: THE PATH FORWARD

Paul Benjamin Linton

WRONG ENOUGH TO FIX: MEASURING AND WEIGHING WRONGNESS IN *RAMOS V. LOUISIANA*

Michael G. Schietzelt

NATIONAL LAWYERS CONVENTION

PRIVATE CONTROL OVER PUBLIC DISCOURSE

Distinguished Panelists

NOTE

A COUNTRY DIVIDED: REFINING THE MINISTERIAL EXCEPTION TO BALANCE AMERICA'S DIVERSITY

Richard C. Osborne III

VOLUME 34 | **2021–2022** | **NUMBER 3**

The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit. The flame and the lamp represent the lamp of learning and the fire of the Holy Spirit. Laced throughout the crest is a ribbon that signifies the unity Christians share. The mission of Regent University is embodied in the surrounding words "DUCTUS CHRISTIANUS AD MUNDUM MUTANDUM"— "Christian Leadership to Change the World."

REGENT UNIVERSITY LAW REVIEW

ISSN 1056-3962. The *Regent University Law Review* is published at Regent University and is produced and edited by the students at Regent University School of Law under the supervision of the faculty. The domestic subscription rate is $14.00 per issue. Third-class postage paid at Virginia Beach, Virginia. POSTMASTER: Send address changes to Editor-in-Chief, Law Review, Regent University School of Law, Virginia Beach, VA 23464-9800. Absent receipt of notice to the contrary, subscriptions to the *Law Review* are renewed automatically each year. Claims for issues not received will be filled for published issues within one year before the receipt of the claim. Subscription claims for issues beyond this limitation period will not be honored.

All articles copyright © 2022 Regent University Law Review, except where otherwise expressly indicated. For permission to reprint an article or any portion thereof, please address your written request to the holder of the copyright. For any article to which Regent University Law Review holds the copyright, permission is granted to reprint any portion of the article for educational use (including inclusion in a casebook intended primarily for classroom use), provided that: (1) in the case of copies distributed in class, students are charged no more than the cost of duplication; (2) the article is identified on each copy according to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (21st ed. 2020); (3) proper notice of copyright is affixed to each copy; and (4) Regent University Law Review is notified in writing of the use.

Regent University Law Review accepts unsolicited manuscripts by email addressed to the Editor-in-Chief. Citations in submitted manuscripts should use footnotes and conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (21st ed. 2020).

Address all correspondence to Editor-in-Chief, Regent University Law Review, Regent University School of Law, 1000 Regent University Drive, RH 252C, Virginia Beach, VA 23464. Regent University Law Review's e-mail address is *lawreview@regent.edu*, and Law Review's website address is *https://www.regentuniversitylawreview.com*.

Opinions expressed in any part of the Regent University Law Review *are those of individual contributors and do not necessarily reflect the policies and opinions of its editors and staff, Regent University School of Law, its administration and faculty, or Regent University.*

REGENT UNIVERSITY LAW REVIEW

Volume 34 | **2021–2022** | **Number 3**

Editor-in-Chief
DALTON A. NICHOLS

BOARD OF EDITORS

Executive Editor
ANNA L. EDWARDS

Executive Editor
RICHARD C. OSBORNE

Managing Editor
TSCHIDA INNES

Managing Editor
BRETT TIDRICK

Managing Editor
J. ALEX TOUCHET

Articles Editor
TANNER RAY

Notes & Comments Editor
BRANDON AKERS

Notes & Comments Editor
TIMOTHY WELLS

Senior Editor
TORI HIRSCH

Senior Editor
ALLISON ALLGOOD

Senior Editor
EMILY COYLE

Senior Editor
AUSTIN COAD

STAFF EDITORS

KELLY AESCHLIMANN
ANNA BAHR-FITE
JOSHUA-CALEB BARTON
GABRIELLE A. BRUNO
MCKAMIE CHANDLER
DAVID A. CHESLEY
DAVIS DILLING
LOGAN A. EASLEY
COLTON FRANCOEUR
TYLER GUSTAFSON
LUKE ISBELL
ARIE JONES
ISAIAH KLASSEN
DAVID LIVERMON
TAYLOR PHILLIPS
MATTHEW RAUNIKAR
ANNA ELIZABETH RAYKOVICS
MITCHELL SANDERS
ALISON SHERRILL
FOLAFOLUWA SOLUADE
ELIJAH STACKS

FACULTY ADVISOR
LYNNE M. KOHM

EDITORIAL ADVISORS
JAMES J. DUANE & MICHAEL G. SCHIETZELT

REGENT UNIVERSITY LAW REVIEW

Volume 34 **2021–2022** **Number 3**

CONTENTS

ARTICLES

STARE DECISIS, SETTLED PRECEDENT, AND *ROE V. WADE*: AN INTRODUCTION

Clarke D. Forsythe & Regina Maitlen 385

NEUTRALIZING STATE CONSTITUTIONS AS A SOURCE OF ABORTION RIGHTS: THE PATH FORWARD

Paul Benjamin Linton 471

WRONG ENOUGH TO FIX: MEASURING AND WEIGHING WRONGNESS IN *RAMOS V. LOUISIANA*

Michael G. Schietzelt 515

NATIONAL LAWYERS CONVENTION

PRIVATE CONTROL OVER PUBLIC DISCOURSE

Distinguished Panelists 539

NOTE

A COUNTRY DIVIDED: REFINING THE MINISTERIAL EXCEPTION TO BALANCE AMERICA'S DIVERSITY

Richard C. Osborne III 607

REGENT UNIVERSITY LAW REVIEW

Volume 34 **2021–2022** **Number 3**

STARE DECISIS, SETTLED PRECEDENT, AND *ROE V. WADE*: AN INTRODUCTION

Clarke D. Forsythe[*] & *Regina Maitlen*[**]

TABLE OF CONTENTS

INTRODUCTION

I. SETTLED LAW, DOCTRINE, AND PRECEDENT

A. The Complete Latin Maxim and Settled Law
B. Settled Law in the Colonies and Founding Era Derived from English Common Law
C. Judicial Emphasis on Settled Law in the 18th and 19th Centuries
D. Twentieth Century Doctrine

II. FACTORS THAT MAY SETTLE A DECISION

A. Acquiescence
B. Age
C. A Series of Consistent Decisions Reaffirming the Rule

---

[*] Senior Counsel, Americans United for Life. We wish to thank Hugh Phillips, Shane Rider, Emily Ostertag, Ryan Desrosiers, Grace Berner, and Eric Abels for research assistance. We are grateful to the editors of the Regent University Law Review for their conscientious and excellent work on this article.

[**] Regina Maitlen is an attorney who collaborates with Americans United for Life. She would like to thank the entire AUL Staff for their continuous support. She is also grateful for her husband's daily encouragement and patience throughout the research and writing of this article.

D. Investigated Thoroughly and with Care
E. A Well-Reasoned Decision with Clear Rules
F. Actual Practice of the United States Departments, Federal Courts, and States

III. REASONS WHY *ROE V. WADE* REMAINS UNSETTLED

A. Has Roe *Ever Been Settled?*
B. Unsettled by Dissents and a Divided Court
C. Unsettled by Legislative and Executive Lack of Acquiescence
D. Unsettled by State Non-Acquiescence
E. Unsettled by Lower Court Criticism
F. Unsettled by a Poorly Reasoned, Overly Broad Opinion and a Mistaken Understanding of History, Facts, and Science
G. Unsettled by the Court's Unworkable Role as "the Nation's Ex Officio Medical Board"
H. Unsettled by a Constantly Shifting Standard of Review and Conflicting Precedents
I. Unsettled by a Viability Rule Without Constitutional Justification
J. Unsettled by Doctrinal Developments
K. Unsettled by Scholarly Criticism, Politicians, the Media, and the Public
L. Unsettled by the Unsuccessful Search for a Constitutional Rationale
M. Planned Parenthood v. Casey *Did Not Settle* Roe

CONCLUSION

INTRODUCTION

Modern Supreme Court caselaw and scholarly commentary on stare decisis has strayed from the doctrine's roots in the complete Latin maxim *stare decisis et quieta non movere*. The maxim, in its proper form, means to "stand by the decisions and not disturb what is settled." Today, most only know the truncated phrase "stare decisis," which is often wrongly interpreted to mean adhering to any prior decision.[1] That understanding ignores any notion of "settled law." Settled law, rather than adhering to anything that has been decided, is at the heart

[1] *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment) ("*Stare decisis* ('to stand by things decided') is the legal term for fidelity to precedent."); Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981) (en banc) ("We tend to think of *stare decisis* as only 'it is decided.' The full phrase is *stare decisis et non quieta movere*—'to adhere to precedents *and not to unsettle things which are established*.'").

of the doctrine of *stare decisis et quieta non movere* and the primary justification for the doctrine's application.

Traditionally, courts considered *settled* law binding unless a *compelling reason* existed to reconsider it.[2] If the legal rule is *unsettled*, it is likely that one or more of the other factors of stare decisis has unsettled the legal rule, and the rule is not entitled to stare decisis respect or weight.[3] In 1924, the Chief Justice of the Pennsylvania Supreme Court, Robert von Moschzisker, observed that judges commonly overlooked the second "half" of the rule: "If the last half of the rule had been as consistently kept in mind by the judiciary as has the first half, complaints against it, and misunderstandings of it, would be less frequent."[4]

By contrast, in *Chazen v. Marske*,[5] then-Judge Amy Coney Barrett concurred in a Seventh Circuit panel decision affirming a prisoner's granted habeas corpus relief. In her concurrence, she stated the Seventh Circuit habeas standard was unsettled due to inconsistent precedent defining the standard, which also veered, over time, from the statutory text.[6] Judge Barrett concurred with the result "because it has support in our precedent" but wrote to highlight that the precedent was inconsistent and not settled by the immediate decision.[7] Judge Barrett concluded, "In a later case, this is an issue that deserves our careful consideration" in order "to give litigants and district courts better guidance."[8] This is the purpose of settling the law.

Settlement is the starting point of *stare decisis et quieta non movere* and the primary focus of the doctrine. Numerous decisions, beginning with some of the Supreme Court's earliest decisions, have addressed many factors which make or leave a Supreme Court decision unsettled. Traditional factors include lack of acquiescence by judges, Congress, the Executive Branch, state legislatures, the legal community, and the public; lack of careful investigation in the original decision, including factual and historical errors; judicial criticism; scholarly criticism; poor reasoning; conflicting precedents; conflicting

---

[2] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) (stating that the Court may overturn precedent once there are compelling reasons to do so).

[3] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (discussing factors for overruling precedent).

[4] Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 409 (1924). Von Moschzisker's article was cited with approval by Justice Cardozo in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 n.1 (1932).

[5] 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring).

[6] *See id.* at 863–64 ("We have stated the 'saving clause' test in so many different ways that it is hard to identify exactly what it requires.").

[7] *Id.* at 863.

[8] *Id.* at 866.

doctrinal developments; unworkable rules, especially if they are judge made; and lack of settled expectations.

Unsettlement starts in agitation or controversy. Because *Roe v. Wade* is widely acknowledged as one of the most controversial Supreme Court decisions of the 20th century,[9] it provides an excellent case study to examine what settles (or leaves unsettled) a Supreme Court decision. This Article traces the Court's emphasis on settled law, doctrine, and precedent to its earliest decisions; identifies the elements of settlement; and applies those elements to determine whether *Roe v. Wade* is settled.

I. SETTLED LAW, DOCTRINE, AND PRECEDENT

A. The Complete Latin Maxim and Settled Law

Stare decisis is a truncated form of the Latin maxim *stare decisis et quieta non movere*, which means "to stand by things decided, and not to disturb settled points."[10] This is one thought, not two: stand by decisions and not disturb what is settled. To be respected as precedent, *stare decisis et quieta non movere* requires the law to be settled. As the author of Black's Law Dictionary wrote in 1886,

> Its meaning is, that when a point of law has been once solemnly and necessarily settled by the decision of a competent court, it will no longer be considered open to examination, or to a new ruling, by the same tribunal or those which are bound to follow its adjudications.[11]

---

[9] *See* MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 65–66 (2015) (writing about *Dred Scott*, saying "no other case, with the possible exception of *Roe v. Wade* (1973), has ever called down such opprobrium upon the Court"); JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 3 (2007) (describing *Roe v. Wade* as the Court's most controversial decision); Dawn E. Johnsen, *A Progressive Reproductive Rights Agenda for 2020*, *in* THE CONSTITUTION IN 2020, at 255, 255 (Jack M. Balkin & Reva B. Siegel, eds., 2009) ("The Supreme Court's decision in *Roe v. Wade* continues to be both celebrated and reviled with an intensity rarely inspired by a Court decision.").

[10] John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 n.1 (1983) (quoting Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501, 501 (1945)). *Stare decisis et quieta non movere* (rather than *non quieta movere*) preserves the proper sense of "do not disturb."

[11] Henry Campbell Black, *The Principle of Stare Decisis*, 25 AM. L. REG. 745, 745 (1886).

Supreme Court justices,[12] state courts,[13] and legal scholars[14] have occasionally recognized this as the meaning. However, when they use the shorthand without fidelity to its original maxim, the doctrine can be distorted by emphasizing past decisions or precedents without regard to whether they are settled and, hence, accepted, consistent, and reliable.[15] The shorthand leaves out the reason behind the rule.

Settling the law is the consistent thread that explains much of stare decisis doctrine. Settled law embodies the virtues of stare decisis: consistency, predictability, and reliability.[16] Settling the law explains why stare decisis has often been described as a judicial "policy."[17] Stare decisis *may* "expedite[] the work of the courts by preventing the constant reconsideration of settled questions," *if* the precedent is settled.[18] As Justice Cardozo once noted, "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[19] A "secure foundation" exists only if it is settled and not subject to change or movement.

---

[12] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (describing the doctrine of stare decisis).

[13] *See, e.g.*, Clark v. Child.'s Mem. Hosp. 955 N.E.2d 1065, 1086 (Ill. 2011) (recognizing that the court should not "disturb settled points").

[14] *See, e.g.*, Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 421 n.14 (2006) ("Stare decisis is from the Latin phrase, 'stare decisis et non quieta movere,' meaning, 'to stand by things decided, and not disturb settled points.'").

[15] *See* Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–13 (2010) (discussing the limitations of the doctrine of stare decisis).

[16] Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles . . . .").

[17] State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (describing stare decisis as a "policy judgment"); *accord* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision[s]."); Park Constr. Co. v. Indep. Sch. Dist. No. 32, 296 N.W. 475, 478 (Minn. 1941) ("[T]he American doctrine of *stare decisis* is guiding policy, not inflexible rule."); Michael Stokes Paulsen*, Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1170 (2008) (describing stare decisis as a policy consideration); *see also* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 28–29 (1959) ("[Stare decisis is] a general policy of all courts to adhere to the ratio decidendi of prior cases decided by the highest court in a given jurisdiction. . . . As applied to the highest courts in each jurisdiction, however, stare decisis *is purely a matter of policy*." (emphasis added)).

[18] Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 652 (1999) (citing von Moschzisker, *supra* note 4, at 410).

[19] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1964).

B. Settled Law in the Colonies and Founding Era Derived from English Common Law

There is a longstanding tradition in Anglo-American law, since the early colonies, respecting the importance of written and settled laws to identify and secure rights and liberties. This tradition can be traced back to the Magna Carta of 1215[20] and was reiterated as a priority throughout English law.[21] Since the common law was judge-made law, and rulings from common law judges could contradict each other, the need for settlement in the common law was obvious, as Blackstone emphasized.[22]

The desire for written and settled laws was important to Americans since the earliest colonies.[23] Unwritten laws created

---

[20] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta. . . . The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.'"); Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819) (writing that Magna Carta represented "the good sense of mankind" that individuals must be free "from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice").

[21] *See, e.g.*, JAMES RAM, THE SCIENCE OF LEGAL JUDGMENT 223–24 (N.Y., Baker, Voorhis & Co., L. Publishers 1871) (Chapter XIV: Of Precedent) (citing Morecock v. Dickins (1768) 27 Eng. Rep. 440, 441 (refusing to abandon settled precedent, stating "much property has been settled, and conveyances have proceeded upon the ground of that determination"); Jones v. Randall (1774) 98 Eng. Rep. 706, 707 (William Murray, Lord Mansfield (1705-1793)) ("Precedent indeed may serve to fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent."); Robinson v. Bland (1760) 96 Eng. Rep. 141, 144 ("Where an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the Judges, till the Legislature thinks proper to alter it: lest the new determination should have a retrospect, and shake many questions already settled . . . ."); Williams v. Germaine (1827) 108 Eng. Rep. 797, 800–01 (Lord Tenterden, C.J.) ("It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established and continued to be acted upon for many years should not be changed unless it appears clearly to have been founded upon wrong principles."); William Green, *Stare Decisis*, 14 AM. L. REV. 609, 614–15, 626–27, 644 (1880) (reviewing numerous English cases and settled law).

[22] 1 WILLIAM BLACKSTONE, COMMENTARIES *6 (discussing the importance of knowing the law).

[23] GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 119–22 (1960) ("The movement for written laws was one of the most important developments of the second, or legislative, period [in the Massachusetts Bay Colony]. . . . [T]he progressive reduction of the colony laws to writing imposed a curb on the power of the magistrates by displacing to a substantial degree the process of judicial lawmaking . . . and a hard core of fixed rules substituted as the heart of the legal system."); *id.* at 122 ("The danger of permitting an authoritative organ to settle interest conflicts is, of course, the danger that it will be arbitrary. . . . When those

uncertainty and could lead to broad administrative discretion and possibly arbitrary governance. Written laws protected the rights of citizens and limited discretion. For example, within the first 20 years of the Massachusetts Bay Colony, the demand for written laws began by 1634,[24] and the first code was formulated in 1648.[25] A similar demand was made in other colonies.[26] In referring to constitutional protections for minority rights, Chancellor James Kent of New York referred to the need for "some express provisions of this kind clearly settled in the original compact."[27]

The early American colonies and states also desired settled laws for prosperity. Settled law was favored by commercial stakeholders who wanted secure titles on which they could depend.[28] Settlement was especially necessary to secure property rights.[29] American courts

---

rules are publicly known, they create confidence that the organ will act impartially, that is, that it will arrive at the same kind of decision reached in a previous conflict of the same character.").

[24] *Id.* at 119 (describing the formulation of legal rules and legislative enactments during 1634); *see also* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 380 (Ass'n of Am. L. Schs. ed., 1907) ("In 1646, there was a very important controversy, in which a party of men led by Robert Child demanded the establishment of English law. In their remonstrances they say that they cannot discern a settled form of government according to the laws of England; nor do they perceive any laws so established as to give security of life, liberty, or estate. They object to discretionary judgments as opposed to the unbowed rule of law, and petition for the establishment of the wholesome laws of England, which are the result of long experience and are best agreeable to English tempers; that there should be a settled rule of adjudicature from which the magistrates cannot swerve." (internal citation omitted)).

[25] HASKINS, *supra* note 23, at 135–36.

[26] *See* Reinsch, *supra* note 24, at 390 (describing the demand in New York for a common law).

[27] James Kent, *An Introductory Lecture to a Course of Law Lectures* (1794), *reprinted in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805, at 941 (Charles S. Hyneman & Donald S. Lutz, eds., 1983).

[28] *See, e.g.*, 1 CHARLES FEARNE, AN ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES 170 (4th Am. ed. 1845) ("If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape, which in his fancy best becomes the times; if the decision of one case were not to be ruled by or depend at all upon former determinations in other cases of a like nature; I should be glad to know, what person would venture to purchase an estate, without first having the judgment of a court of justice, respecting the identical title under which he means to purchase?").

[29] Lee, *supra* note 18, at 699 (emphasizing "[t]he extent of the Taney Court's willingness to correct apparently erroneous precedent turned entirely on whether a change of course would 'disturb . . . rights of property . . . or interfere with any contracts heretofore made'" (omissions in original) (quoting The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459 (1851))); *id.* ("By the founding era, English courts and American commentators had embraced the notion of an enhanced rule of stare decisis in cases involving rules of property.").

expressed that concern, as well as respected treatise writers.[30]

However, settlement applied to more than just property rights. The purpose of respecting precedent was to obtain settled laws. As Nathan Dane wrote, "That the law may be settled and certain, as far as practicable, all judges are bound to respect prior judicial decisions, regularly made, and to presume the courts making them, had good reasons for so doing, where the contrary does not appear."[31] Treatise authors fostered settled law and stability: "A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if constantly deviated from."[32]

The Supreme Court has occasionally cited William Blackstone and Federalist No. 78 in support of respect for precedent.[33] "Blackstone first stated the general principle in seemingly strict terms: 'For it is an established rule to abide by former precedents, where the same points come again in litigation . . . .'"[34] "Established" has long been a synonym for "settled" used by judges and treatise writers, as Blackstone demonstrates.[35]

In the four volumes of his *Commentaries on the Laws of England*, Blackstone *never* mentions stare decisis once—either the abbreviation or the complete Latin maxim.[36] There are essentially only two passages in his *Commentaries* in which Blackstone addresses "precedent" at any

---

30 Jones's Lessee v. Anderson, 4 Yeates 569, 575 (Pa. 1808) ("Unless the rule of *stare decisis* is adhered to in the administration of justice under a government of laws, all property must be rendered insecure."); Commonwealth v. Coxe, 4 U.S. (4 Dall.) 170, 192 (Pa. 1800) ("*Stare decisis*, is a maxim to be held forever sacred, on questions of property . . . ."); Black, *supra* note 11, at 746 ("If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property.").

31 6 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 424 (1824); *accord* Charles J. Reid Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 AVE MARIA L. REV. 47, 54–55 (2007) (tracing stare decisis in American law in the 19th century).

32 J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 541 (1878) (quoting Giblin v. Jordan, 6 Cal. 416, 418 (1856)).

33 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (discussing Blackstone's writings and how Federalist 78 highlighted the importance of stare decisis); Gamble v. United States, 139 S. Ct. 1960, 1982, 1986 (2019) (Thomas, J., concurring) (discussing precedent and Federalist No. 78).

34 Lee, *supra* note 18, at 661 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

35 *See* 1 BLACKSTONE, *supra* note 22, at *21–22 (using the term "established" to describe law that has long been understood).

36 *See, e.g.*, *id.* at *69–70 (discussing following precedent at length without referring to the Latin maxim); 3 *id.* at *432–33 (similar).

length.[37] However, while stare decisis was not mentioned explicitly, both passages assumed the existence of settled or established rules.

Blackstone divides the common law "into two principal grounds or foundations"—(1) "[e]stablished customs" and (2) "[e]stablished rules and maxims"—which he considered to be "one and the same thing."[38] He wrote that "the authority of these maxims rests entirely upon general reception and usage"—in other words, settled by *acquiescence* or agreement.[39] "[A]nd the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it"—i.e., settled.[40] The premise of settled law is present throughout the four books.[41]

Federalist No. 78 is often cited as an authority on "precedents."[42] Passages have been quoted by the Court on several occasions,[43] most recently in *Ramos*: "To 'avoid an arbitrary discretion in the courts, it is indispensable' that federal judges 'should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.'"[44] The priority for settled or established law is an essential premise of this passage. Hamilton assumed that *settled* "rules and precedents" exist because otherwise there would be no "strict" or defined rules, nor, unless settled, could they "define and point out."[45]

---

[37] 1 BLACKSTONE, *supra* note 22, at *69–70 (discussing precedent); 3 *id.* at *432–33 (showing reverence for precedent).

[38] 1 BLACKSTONE, *supra* note 22, at *68.

[39] *Id.*

[40] *Id.*

[41] *See, e.g.*, *id.* ("This, for the most part, settles the course in which lands descend by inheritance . . . ."); *id.* at *72 (describing treaties "which are now become settled and first principles"); 3 *id.* at *24 ("For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary."); *id.* at *109 ("For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury it's [sic] proper redress."); *id.* at *283 ("And this fiction, being beneficial to all parties, is readily acquiesced in, and is now become the settled practice . . . ."); 4 *id.* at *355 ("But it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial . . . .").

[42] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (discussing how Federalist No. 78 highlighted the importance of stare decisis); Gamble v. United States, 139 S. Ct. 1960, 1981–82, 1986 (2019) (Thomas, J., concurring) (discussing precedent and Federalist No. 78); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 118–122 (2015) (Thomas, J., concurring in judgment) (discussing the arguments between the Federalists and Anti-Federalists over the power of the judiciary).

[43] *See* Rogers v. Tennessee, 532 U.S. 451, 473 n.2 (2001) (Scalia, J., dissenting) (quoting Federalist No. 78); Missouri v. Jenkins, 515 U.S. 70, 129, 133 (1995) (Thomas, J., concurring) (same); Trump v. Hawaii, 138 S. Ct. 2392, 2426–28 (2018) (Thomas, J., concurring) (same).

[44] *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting Federalist No. 78).

[45] THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Ian Shapiro ed., 2009).

Neither Blackstone nor the Federalist Papers gave strong guidance for practically deciding proper respect for precedent and settled law in a new nation governed by constitutional and statutory texts. This duty fell to federal and state judges who were the most authoritative in determining whether the law was settled and what compelling reasons, if any, might have justified overturning settled law.

C. Judicial Emphasis on Settled Law in the 18th and 19th Centuries

In the 18th and 19th centuries, the development of stare decisis was iterative, with judges applying the maxim case after case. American courts desired settled law and hesitated to overturn it without a "compelling reason." That "compelling reason" was left to be spelled out through caselaw.[46]

In 1786, Chief Justice Thomas McKean of the Pennsylvania Supreme Court expressed the need for settled law in *Kerlin's Lessee v. Bull*:

> This Act of Assembly has been made upwards of twenty years ago, and the question upon it now before the Court has received at least one judicial determination thirteen years ago, that the real estate, in such a case, should be distributed among the intestate's brothers and sisters equally. When there has been a solemn determination before two Judges of the Supreme Court after debate, and an *acquiescence* under it, there ought always to be great consideration paid to it, that the law may be certain.[47]

---

[46] *See, e.g.*, Hurst v. Florida, 577 U.S. 92, 102 (2016) ("[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." (alteration in original)) (citations omitted); Citizens United v. FEC, 558 U.S. 310, 408 (2010) (Stevens, J., concurring in part and dissenting in part) (stating that to reject stare decisis the rule of law "must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine"); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[W]e have overruled prior decisions where the necessity and propriety of doing so has been established."); Nat'l Bank v. Whitney, 103 U.S. 99, 102 (1880) ("Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons . . . . "); *In re* Jonathon C.B., 958 N.E.2d 227, 251 (Ill. 2011) ("Any departure from *stare decisis* must be specially justified and prior decisions should not be overruled absent good cause or compelling reasons.") (citations omitted); State v. Marsh, 102 P.3d 445, 486 (Kan. 2004) (McFarland, C.J., dissenting) ("Our fidelity to the doctrine of stare decisis need not be absolute, but we should not abandon our prior decisions without a compelling reason to do so.").

[47] 1 U.S. (1 Dall.) 175, 178 (Pa. 1786) (emphasis added).

While McKean did not use the word "settle" expressly, his opinion is clear that judicial acquiescence was important for settling the law and leading to certainty.[48] In 1792, the New Jersey Supreme Court decision in *Fisher v. Morgan* deferred to "the law as it has long been established," and emphasized that judges "cannot control or alter the settled principles of the law in order to accommodate them to our individual ideas of justice and fitness."[49]

Correcting judicial error and settling the law was a priority of jurists during the 18th and 19th centuries.[50] In his *Commentaries*, Chancellor Kent wrote:

> If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error.[51]

Kent emphasized that "there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application."[52] For these reasons, numerous judges and scholars have considered stare decisis as a "presumption" or a "rebuttable presumption."[53] Thus, Kent in one

[48] *Id.* at 179 (stating the need to follow a long-standing construction of an Act to avoid creating uncertainty of the law).

[49] 1 N.J.L. 125, 126–27 (1792).

[50] *See, e.g.*, Brown v. Phx. Ins. Co., 4 Binn. 445, 478 (Pa. 1812) (Brackenridge, J.) (emphasizing correction of error); Purcell v. Macnamara (1807) 103 Eng. Rep. 533, 535 (Lawrence, J.) ("I think that the case of *Pope v. Foster* was wrongly decided."); Jollife v. Hite, 5 Va. (1 Call) 301, 328 (1798) (Pendleton, P.) (disagreeing with precedent); Reid, *supra* note 31, at 69–70, 72, 74 (collecting English and American cases).

[51] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *476; *see also* HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 65 (1814) ("I do not think, therefore, that so much weight ought to be attached to decisions in this state [Pennsylvania]; or that the not appealing should be considered as an acquiescence in the reason of them. . . . I do not consider the principles of construction so far settled as to preclude examination.").

[52] KENT, *supra* note 51, at *477.

[53] Stevens, *supra* note 10, at 8 ("The doctrine creates a presumption that generally should be followed."); Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993) ("[T]here is a heavy presumption that settled issues of law will not be reexamined."); Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1409 (2012) [hereinafter *Transtemporal Separation*] ("the rule of stare decisis [is] the presumption that a legal conclusion in an earlier opinion continues to govern later cases in the same or inferior courts."); Reid, *supra* note 31, at 54 (similar); Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1442 (2007) ("[S]tandard theories of stare decisis grant precedent at least presumptive validity . . . ."); Stephen Markman,

of his earliest decisions, looked at English precedent on libel law but concluded that "[t]he *English* decisions on the subject of libels have not been consistent in principle."[54] Kent decided that English precedent on this point was "unsettled and at variance."[55]

From its earliest years, the Supreme Court also emphasized the importance of settled law[56] as did counsel who argued before the Court.[57] Chief Justice Marshall and the Marshall Court focused on *settling* the great outlines of the U.S. Constitution, the relationship between the three federal branches, and the relationship between the federal and state governments. The Marshall Court settled these principles in the great cases decided between 1801 and 1835, including

---

Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions, 8 TEX. REV. L & POL. 283, 284 (2004) ("While the principle of *stare decisis* creates a presumption, a strong presumption, in favor of adherence to a prior judicial decision . . . it is a presumption that can be overcome."); Robert L. McFarland, Stare Decisis *for Me, but Not for Thee*, PUBLIC DISCOURSE (Mar. 16, 2017), https://www.thepublicdiscourse.com/2017/03/18762/ ("[*S*]*tare decisis* creates a rebuttable presumption in favor of adhering to prior judicial decisions. The presumption of deference to precedent is rebuttable in several ways . . . ."). Chancellor Kent also referred to a "presumption." "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness." KENT, *supra* note 51, at *476.

[54] People v. Croswell*,* 3 Johns. Cas. 337, 379 (N.Y. Sup. Ct. 1804).

[55] *Id.* at 389.

[56] *See, e.g.*, Georgia v. Brailsford*,* 3 U.S. (3 Dall.) 1, 4 (1794) ("[T]he only point that remains, is to settle what is the law of the land arising from those facts."); Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 96 (1795) (opinion emphasizing settled law); Williamson v. Suydam, 73 U.S. (6 Wall.) 723, 736 (1868) (noting that settled law will be applied in analogous cases); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 338 (1853) (noting that cases conforming to settled law do not necessarily need separate opinions); Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 517, 519 (1844) (describing settled laws).

[57] *See, e.g.*, The Passenger Cases, 48 U.S. (7 How.) 283, 292 (1849) (recounting counsel's argument, "If, in ordinary questions, it is the interest of the public that there should be an end of litigation as to what the law is, is it not emphatically the interest of the public that their great organic law should be fixed and settled? . . . If in ordinary cases between man and man it is important that the law should be settled, it seems to me that it is *infinitely more important to the community that the construction of the Constitution should be settled*" (emphasis added)); *id.* at 379 (describing counsel's urging for the Court "to adhere to the just rules already laid down, to practise the great maxim which secures respect and renders certain the rights of property and life, *Stare decisis*."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 35 (1824) (describing counsel's argument as "[i]t is perfectly settled, that an affirmative grant of power to the United States does not, of itself, d[i]vest the States of a like power. The authorities cited settle this question, and it is no longer open for discussion in this Court"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 378 (1819) (recounting counsel's argument, "The constitutionality of the establishment of the bank . . . is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive, and judicial"); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 87 (1807) (recounting counsel's argument, "We contend that the case is settled by these decisions, and that it is no longer a question whether this court has the power. . . . Shall it be said that no part of our law is fixed and settled, except what is positively and expressly enacted by statute?").

Marbury v. Madison,[58] *Fletcher v. Peck*,[59] *McCulloch v. Maryland*,[60] and *Gibbons v. Ogden*.[61] "[T]he power and authority" of these decisions "are all the greater because they came from a unanimous Court."[62]

In the first half of the 19th century, the Supreme Court issued nearly two dozen decisions that emphasized settled law as a premise of the Court's reasoning or as an important principle of law. In *Clementson v. Williams*, involving the statute of limitations in a commercial dispute, Chief Justice Marshall wrote for the Court: "So far as decisions have gone on this point, principles may be considered as settled, and the Court will not lightly unsettle them."[63] The early Supreme Court looked to acquiescence (acceptance), first by the Court itself, to determine if there was unanimity.[64] Then they looked to acquiescence by other judges or governmental departments, contemporaneous exposition, or a series of consistent decisions.[65]

In *Jackson ex dem. St. John v. Chew*, the Court held, in an opinion by Justice Thompson, "where any principle of law, establishing a rule of real property, has been settled in the State Courts, the same rule will be applied by this Court that would be applied by the State tribunals."[66] The Court defined "long settled by a uniform series of adjudications in New-York."[67] Justice Thompson asked "whether the question arising in this case, has been so settled in the State Courts of New-York, as to be considered at rest there."[68] In his opinion for the Court, Justice Thompson examined a series of New York decisions to determine whether the question was settled in the state.[69] *Jackson* is an early example of a judicial error in property law that, once

---

[58] 5 U.S. (1 Cranch) 137, 147, 149, 173–74, 177–78 (1803) (describing the outlines of the U.S. Constitution and the role of the judiciary).

[59] 10 U.S. (6 Cranch) 87, 116–17, 119, 128–29, 133–39 (1810) (illustrating principles that outline the Constitution and the relationship between state and federal government).

[60] 17 U.S. (4 Wheat.) at 400–06, 408–12, 436 (discussing constitutional interpretation and the relationship between state and federal government).

[61] 22 U.S. (9 Wheat.) at 187–88, 193, 198–99, 210–11 (determining the constitutional parameters of federal government's commerce power and the relationship between state and federal governments).

[62] UROFSKY, *supra* note 9, at 46.

[63] 12 U.S. (8 Cranch) 72, 74 (1814); *see also* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 762 (1824) ("[I]t has long been settled, that the Circuit Courts can exercise no jurisdiction but what is conferred upon them by law.").

[64] *See, e.g.*, BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 42, 233 (2016) (describing how approval through citation of a court's opinion reflects agreement).

[65] *See, e.g.*, *id.* at 233–34 (describing how acceptance by other judges and branches of government bolsters precedent).

[66] 25 U.S. (12 Wheat.) 153, 162 (1827).

[67] *Id.* at 153.

[68] *Id.* at 162.

[69] *Id.* at 162–66.

acquiesced to by state courts, would, nevertheless, be considered settled.[70]

Three mid-century Taney Court decisions continued to emphasize "settled law" in property cases. Justice Wayne's majority opinion in *Louisville, Cincinnati, & Charleston Railroad v. Letson* overruled *United States v. Deveaux*,[71] emphasizing that the case did *not* involve a rule of property and could more easily be reconsidered in *Townsend v. Jemison*.[72] While the Court discussed several cases, it ultimately held that those cases settled the point because they fully examined "all the authorities upon the subject."[73]

Justice Grier's majority opinion in *Barnard v. Adams*, may be the first in which the Court touched on the relative importance between "settled" and "right."[74] Justice Grier wrote, "In questions involving so much doubt and difficulty, it is of more importance to the mercantile community *that the law be settled, and litigation ended, than how it is settled*."[75] The Court was unwilling to overrule precedent in a commercial property case.[76]

The same doctrine was reiterated in *Gilman v. City of Philadelphia*, involving a dispute over waterways and the construction of a bridge by a city authorized by the State.[77] The Supreme Court affirmed the state's authority.[78] Justice Swayne delivered the majority opinion for a 6-3 Court, stating: "It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous."[79]

However, the importance of correcting judicial error even in a case of settled precedent was evident in Chief Justice Taney's opinion in the famous *Passenger Cases*. Chief Justice Taney wrote in dissent: "After such opinions [in the *License Cases*], judicially delivered, I had

[70] *See id.* at 163–64, 167 (explaining the Court's decision as being based on "a settled course of decisions" that create law that is "*settled beyond controversy*").

[71] *Compare* Louisville, Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 523–24 (1844) (holding that the Court has jurisdiction over a lawsuit where a corporation is a party), *with* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809) (holding that the Court's jurisdiction is limited to cases between citizens so corporations cannot be sued).

[72] *Letson*, 43 U.S. at 523–24; *see also* Townsend v. Jemison, 50 U.S. (9 How.) 407, 414, 416 (1850) (describing the settled law of the statute of limitations regarding owning property depending on the jurisdiction).

[73] *Townsend*, 50 U.S. (9 How.) at 413.

[74] 51 U.S. (10 How.) 270, 302 (1850).

[75] *Id.* (emphasis added).

[76] *Id.*

[77] 70 U.S. (3 Wall.) 713, 721 (1865).

[78] *Id.* at 732.

[79] *Id.* at 721, 724.

supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by decision of this court."[80] But he was willing to reconsider his opinion:

> I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and *that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported*.[81]

Settling property rules continued to be a major focus in the second half of the 19th century.[82] In *The Propeller Genesee Chief v. Fitzhugh*, the Court overruled *The Steam-Boat Thomas Jefferson*.[83] Chief Justice Taney emphasized error that was revealed by subsequent factual developments:

> It is the decision in the case of the Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day.[84]

---

[80] The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

[81] *Id.* (emphasis added).

[82] *See, e.g.*, Gazzam v. Phillip's Lessee, 61 U.S. (20 How.) 372, 377–78 (1857) (overruling Brown's Lessee v. Clements, 44 U.S. (3 How.) 650, 663–64 (1845), stating, "It is possible that some rights may be disturbed by refusing to follow the opinion expressed in [*Brown's Lessee*]; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land, running through a period of some twenty-eight years").

[83] 53 U.S. (12 How.) 443, 455–56 (1851).

[84] *Id.* at 456.

Chief Justice Taney emphasized that no rule of property law was at stake to be unsettled and that if it had, the Court "should have felt ourselves bound to follow it notwithstanding the opinion we have expressed."[85] They could correct judicial error without upsetting a rule of property in a case where changed facts and unforeseen circumstances had eroded the propriety and workability of the original rule.

Two of the most important dissents of the 19th century were written by Justices Curtis and McLean in the notorious case of *Dred Scott v. Sandford.*[86] Justice McLean spent much of his dissent arguing that the tragedy of the Court's decision was due to violating two major points of settled law. The first was Congress's power to establish Territorial Government which was settled by: "acquiescence under a settled construction of the Constitution for sixty years."[87] The second was that when an enslaved person was taken to a free state, he was free.[88]

Better than any single decision by the Supreme Court, Abraham Lincoln's critique of *Dred Scott* provides a valuable summary of stare decisis factors in the 1850s:

> Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."
>
> . . . .
>
> Judicial decisions are of greater or less authority as precedents, according to circumstances. . . .

---

[85] *Id.* at 458.

[86] 60 U.S. (19 How.) 393 (1857); *see also* UROFSKY, *supra* note 9, at 69 (stating that "they were unquestionably the most important dissents handed down in the Supreme Court up to that time").

[87] *Dred Scott,* 60 U.S. (19 How.) at 546–47 (McLean, J., dissenting) (arguing that the majority opinion is ignoring territorial laws and historical laws regarding a slave entering a free state). As an example, Justice McLean pointed to the acquiescence of President Madison in the constitutionality of the National Bank. *Id.* at 546.

[88] *Id.* at 547. Justice McLean emphasized that "down to the above time it was settled by numerous and uniform decisions; and that on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of Missouri." *Id.* at 554–55.

> If this important decision [*Dred Scott*] had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.
>
> But, when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country . . . .[89]

Lincoln had obviously absorbed the factors expressed in caselaw. He recognized that lack of settlement was a significant defect and listed five factors: unanimity, legal public expectation, partisan bias, the steady practice of the departments, false facts, and whether these factors, or others, prevent acquiescence in the decision and prevent it from being settled.[90] He relied on the dissents in *Dred Scott*, which were critical of the historical facts alleged by Chief Justice Taney.[91]

The Supreme Court also respected the settled law of the states in construing their own statutes and constitutions.[92] In *Gelpcke v. City of Dubuque*, involving a suit by municipal bondholders against the city, Justice Swayne's majority opinion stated:

> We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of

---

[89] Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois (June 26, 1857)*, *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 390, 392–93 (1989).

[90] *Id.* at 393.

[91] *See Dred Scott*, 60 U.S. (19 How.) at 545 (McLean, J., dissenting) (examining the historical background of territorial laws and the adoption of the Constitution).

[92] *See, e.g.*, Bank of the U.S. v. Daniel, 37 U.S. (12 Pet.) 32, 53–54 (1834) (giving deference to state statutes when the law is settled); *cf.* Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850) ("It is well settled, too, that no action of any kind can be sustained against the government itself, for any supposed debt, unless by its own consent, under some special statute allowing it, which is not pretended to exist here. . . . Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented." (citation omitted)).

> their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts.[93]

Reasoning from settled law, cases, principles, or doctrines continued as a consistent practice of the Court in the last half of the 19th century.[94] The Court repeated the following phrase in their opinions: "[S]o well settled as to be no longer open to discussion."[95]

D. Twentieth Century Doctrine

The two most influential Supreme Court opinions involving stare decisis in the first half of the 20th century were Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*[96] and Justice Frankfurter's opinion in *Helvering v. Hallock*.[97]

Decided just before the New Deal, *Burnet* involved federal taxes on an oil and gas company in Oklahoma.[98] Justice McReynolds, for a 5-4 Court, narrowly construed the rule of *Gillespie v. Oklahoma* but preserved it, allowing the entity an exemption from taxation.[99] Justice Stone dissented, joined by Justices Brandeis, Roberts, and Cardozo, and argued that if the Court "place[d] emphasis on the orderly

---

93 68 U.S. (1 Wall.) 175, 206 (1863). See also *Detroit v. Osborne*, 135 U.S. 492, 498 (1890) and *Etheridge v. Sperry*, 139 U.S. 266, 275 (1891), for examples of when the Court looked to the states' settled laws.

94 *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); Mugler v. Kansas, 123 U.S. 623, 659 (1887) ("[T]he question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court."); *In re* Ayers, 123 U.S. 443, 487 (1887) ("It must be regarded as *a settled doctrine of this court, established by its recent decisions* . . . ." (emphasis added)); Louisiana v. Jumel, 107 U.S. 711, 750 (1882) ("It is the *settled doctrine* of this court that contracts with States are as fully protected by the Constitution against impairment by State legislation as contracts between individuals." (emphasis added)); Heath v. Wallace, 138 U.S. 573, 585 (1891) ("It is *settled by an unbroken line of decisions* of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." (emphasis added)).

95 Barden v. N. Pac. R.R., 154 U.S. 288, 340 (1894); St. Paul & Pac. R.R. v. N. Pac. R.R., 139 U.S. 1, 5–6 (1891); United States v. S. Pac. R.R., 146 U.S. 570, 593 (1892); N. Lumber Co. v. O'Brien, 204 U.S. 190, 196 (1907) (using the same language into the 20th century).

96 285 U.S. 393 (1932) (Brandeis, J., dissenting). Several opinions have quoted Justice Brandeis's dissent. *E.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2177 (2019); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

97 309 U.S. 106, 119 (1940); *see also infra* notes 124, 130–33 and accompanying text.

98 *Burnet*, 285 U.S at 397–98.

99 *Id.* at 398–99.

administration of justice, rather than on a blind adherence to conflicting precedents, the *Gillespie* case must be overruled."[100]

Justice Brandeis's dissent in *Burnet*, joined by Justices Roberts and Stone, emphasized "correctness" over "settled law," though it is usually cited for the opposite proposition.[101] He agreed with Justice Stone that the *Gillespie* case was "wrongly decided" and should be overruled.[102] This dissent provides Justice Brandeis's famous aphorism: "*Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right*."[103] Judges and scholars often cite this[104] along with his citation of 29 overruled decisions.[105] In *Ramos v. Louisiana*, Justice Kavanaugh referred to Justice Brandeis's aphorism as "canonical."[106]

However, Justice Brandeis's aphorism is sometimes used out of context, as though it was meant to counter the "wrongly decided" factor of stare decisis or dispense with the stare decisis factor of judicial error in favor of settlement. But the aphorism is an introduction to an opinion that then abruptly shifts and does just the opposite. Justice Brandeis declared that *Gillespie* "was wrongly decided and should now be frankly overruled."[107] "Wrongly decided" is a traditional category in stare decisis jurisprudence going back to the late 18th century.[108] That was sufficient for Justice Brandeis to overrule *Gillespie*. By citing Justice Brandeis's aphorism out of context, the question of judicial error is sidelined.[109] This is a position at odds with the traditional concern for correcting error by English and state judges since the 18th century.[110]

---

[100] *Id.* at 405 (Stone, J., dissenting).

[101] *Id.* at 406–07, 413 (Brandeis, J., dissenting); *see also, e.g., Casey*, 505 U.S. at 854 (providing an example of the Court using Justice Brandeis's dissent to follow stare decisis rather than overrule precedent); Runyon v. McCrary, 427 U.S. 160, 175, 175 n.12 (1976) (referring to Justice Brandeis's dissent as proof that precedent should not be overruled).

[102] *Burnet*, 285 U.S at 405 (Brandeis, J., dissenting).

[103] *Id.* at 406 (emphasis added).

[104] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Justice Brandeis's famous aphorism); RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 9 (2017) (same).

[105] *E.g.*, Albert Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 154 (1958).

[106] 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring in part).

[107] *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting).

[108] *See, e.g.*, Purcell v. Macnamara (1807) 103 Eng. Rep. 533, 533; 9 East 157, 157 (KB) (Lawrence, J.) ("I think that the case of *Pope v. Foster* was wrongly decided.").

[109] *See, e.g.,* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (minimizing judicial error in favor of stare decisis factors).

[110] *See supra* notes 46–51 and accompanying text; Reid, *supra* note 31, at 58

Justice Brandeis favored overruling *Gillespie* for an explicit policy reason: "Under the rule of *Gillespie v. Oklahoma* vast private incomes are being given immunity from state and federal taxation."[111] Justice Brandeis quoted the 1910 decision of *Hertz v. Woodman*,[112] which may be the first decision in which the Court declared that stare decisis was "entirely within the discretion of the court."[113] Justice Brandeis's dissent was influential: *Burnet* was overturned six years later.[114]

Justice Brandeis's aphorism, while influential, was not original.[115] A statement by counsel before the Supreme Court in 1849 suggests that the English jurist Lord Mansfield (1705-1793) might have been the originator of the aphorism, stating "that it was not so much matter what the law in the case was, as that it should be settled and known."[116] The phrase was cited in property cases in the 19th century, in both state and federal courts.[117]

Yet, Justice Brandeis also altered the traditional usage. He broadened the aphorism to suggest that it should apply across the board to any area of law, though only in the abstract, since he did not actually apply it in *Burnet*. However, he made it clear that stare decisis should not be used to uphold erroneous settled law "in cases involving the Federal Constitution, where correction through legislative action is practically impossible."[118] Ironically, one influence of Justice Brandeis's dissent in *Burnet*—a *statutory* case—has been to affirm that stare decisis has less weight in *constitutional* cases than statutory cases.[119]

("Kent, accordingly, always wanted to leave enough flexibility in the system to correct such errors.").

111 *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

112 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

113 *Burnet*, 285 U.S. at 405–06 (Brandeis, J., dissenting) (quoting *Hertz*, 218 U.S. at 212).

114 Helvering v. Mountain Producers Corp. 303 U.S. 376, 383 (1938).

115 *See* Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865) ("It is almost as important that the law should be settled permanently, as that it should be settled correctly."); Barnard v. Adams, 51 U.S. (10 How.) 270, 302 (1850) ("[I]t is of more importance to the mercantile community that the law be settled, and litigation ended, than how it is settled."); Wallace v. M'Connell, 38 U.S. (13 Pet.) 136, 145 (1839) (reciting a statement by the Lord Chancellor that said "it would be infinitely better to settle it in any way than to permit so controversial a state to exist any longer").

116 The Passenger Cases, 48 U.S. (7 How.) 283, 292 (1849).

117 *See* Reid, *supra* note 31, at 61, 88 (discussing the historical role of stare decisis in property cases).

118 *Burnet*, 285 U.S. at 406–07 (Brandeis J., dissenting).

119 *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) (explaining that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution"); Conn. Gen. Life Ins.

Burnet demonstrates the tension between strong and weak views of stare decisis in the 1920s and 1930s. In 1924, during a time when criticism of a *strict* doctrine of stare decisis was growing, the Chief Justice of the Pennsylvania Supreme Court, Robert von Moschzisker, examined the complete Latin maxim and observed that judges commonly overlooked the second "half" of the rule regarding settlement.[120] Chief Justice von Moschzisker argued that the efficiency and stability attributed to stare decisis was based on the starting point of settlement:

> It expedites the work of the courts by preventing the constant reconsideration of settled questions; it enables lawyers to advise their clients with a reasonable degree of certainty and safety; it assures individuals that, in so far as they act on authoritative rules of conduct, their contract and other rights will be protected in the courts; and, finally, it makes for equality of treatment of all men before the law and lends stability to the judicial arm of government.[121]

The same tension over stare decisis was evident at a 1940 legal conference featuring Roscoe Pound. Judge Walter Treanor of the U.S. Court of Appeals for the Seventh Circuit observed that "[t]he relative importance of the doctrine has varied from time to time" and referred to contemporary "criticism of the doctrine of *stare decisis*."[122] In contrast, Judge Hutcheson of the Fifth Circuit captured an accurate assessment of stare decisis in the courts during the 19th century:

Co. v. Johnson, 303 U.S. 77, 85 (1938) (Black, J., dissenting) ("The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law."); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring) (stating that stare decisis has "limited application in the field of constitutional law"); *see also, e.g.*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537 n.1 (2000) [hereinafter *Abrogating Stare Decisis*] (collecting cases that evaluate how to reverse stare decisis). Justice Robert H. Jackson asserted in a 1953 speech that "for over a century it has been the settled doctrine of the Supreme Court that the principle of *stare decisis* has only limited application in constitutional cases." Robert H. Jackson, *The Task of Maintaining Our Liberties: The Role of the Judiciary*, 39 A.B.A. J. 961, 962 (1953).

[120] Von Moschzisker, *supra* note 4, at 409.

[121] *Id.* at 410.

[122] *Cincinnati Conference on the Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 203, 224 (March 1940). Justice Ginsburg cited the conference in *American Airlines Inc v. Wolens*, in support of the proposition that "while we adhere to our holding in *Morales*, we do not overlook that in our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'" 513 U.S. 219, 234–35 (1995) (citing *Cincinnati Conference*, *supra*, at 339).

> The American theory is that when law has acquired a settled character through the considered decisions of men qualified to speak with authority, the decisions so settling it become precedents especially if they are connected with rules of property.
>
> In the beginnings of this country, we did not have the idea that just because some supreme court said something once, that necessarily made a precedent and settled the law.[123]

The second most influential statement of stare decisis during the first half of the 20th century was Justice Frankfurter's opinion for the Court in *Helvering v. Hallock*.[124] He addressed *unsettled* federal tax caselaw. The Court examined three statutory decisions which had confused the lower courts due to "distinctions which this Court has itself created."[125] In a 7-2 decision, the Court overruled the precedents.[126] Justice Frankfurter emphasized that "[o]ur problem then is not that of rejecting a *settled* statutory construction."[127] Justice Frankfurter wanted to "reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine."[128] Then came Justice Frankfurter's aphorism, made in the context of dealing with *unsettled precedents*. He rejected adhering to "the latest decision, however recent and questionable, *when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience*."[129]

Justice Frankfurter's aphorism might be called the *Helvering-Adarand* doctrine, which changes or rejects unsettled precedent for an

---

[123] *Id.* at 245–46.

[124] 309 U.S. 106, 109 (1940). Justice Frankfurter's opinion in *Helvering* has been frequently cited by the Court for his following statement:

> We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Id. at 119; *see also* Citizens United v. FEC, 558 U. S. 310, 363 (2010) (quoting *Helvering*, 309 U.S. at 119).

[125] *Helvering*, 309 U.S. at 118, 121–22.

[126] *Id.* at 122.

[127] *Id.* (emphasis added).

[128] *Id.* at 119.

[129] *Id.* (emphasis added).

earlier, more workable rule or doctrine.[130] Justice O'Connor invoked this doctrine in *Adarand Constructors Inc. v. Pena*,[131] and Chief Justice Roberts invoked the doctrine in both *Citizens United v. FEC*[132] and *June Medical Services LLC v. Russo*.[133]

Though Justice Brandeis's and Frankfurter's statements have been influential in numerous court decisions on stare decisis over the decades, they would have greater coherence if consciously analyzed within the context of settled law. It is common for Justices to mention that a precedent is "settled" in the course of an opinion.[134] But these references are often a debating point with other Justices, without an explanation as to how or why the precedent is settled or unsettled.

Although the Justices rarely discuss why a precedent is expressly settled or unsettled, the leading modern decision on unsettled precedent is *Payne v. Tennessee*.[135] In *Payne*, Chief Justice Rehnquist,

---

[130] *See id.* (explaining the importance of using precedent but the willingness to use prior doctrine when necessary).

[131] 515 U.S. 200, 231–32 (1995).

[132] 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

[133] 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring).

[134] *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (emphasizing the importance of "long-settled principles"); *June Med.*, 140 S. Ct. at 2146 (Thomas J., dissenting) ("Contrary to the plurality's assertion otherwise . . . , abortionists' standing to assert the putative rights of their clients has not been settled by our precedents."); McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting) ("The Court reaches the opposite conclusion only by disregarding the 'well settled' approach required by our precedents."); Ramos v. Louisiana, 140 S. Ct. 1390, 1420 n.8 (2020) (Kavanaugh, J., concurring) (citing "well-settled *Teague* principles"); Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) ("Any departure from settled precedent . . . demands a 'special justification[.]'"); Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (referring to "the settled rules of law"); *id.* at 1243 (Thomas, J., dissenting) ("[T]he vagueness doctrine is legitimate only if it is a 'settled usag[e] and mod[e] of proceeding existing in the common and statute law of England . . . .'" (alterations in original)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (maintaining settled law); IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005) (showing that certain laws were "accepted as settled law for several decades"); Cipollone v. Liggett Grp. Inc., 505 U.S. 504, 516 (1992) ("[S]ince our decision in *McCulloch v. Maryland*, it has been settled that state law that conflicts with federal law is 'without effect.'" (internal citations omitted)).

[135] *See* Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) (describing that the Court's usual practice is to follow precedent but that it is not fully constrained by past precedent). See Justice Thomas' majority opinion for a 7-2 Court in *District of Columbia v. Wesby*, where Justice Thomas explained, "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be 'settled law,' . . . which means it is dictated by 'controlling authority' or 'a robust "consensus of cases of persuasive authority[.]'" 138 S. Ct. 577, 589–90 (2018) (internal citation omitted). Further, consider *Wilson v. Layne*, where Chief Justice Rehnquist concluded that there was "an undeveloped state of the law" given "a split among the Federal Circuits" and that "judges thus disagree on a constitutional question." 526 U.S.

in his majority opinion for a 6-3 Court, observed the following factors which have been frequently cited by other Justices addressing stare decisis: narrow margin, dissents on the merits, subsequent questioning by Justices; workability; or lack of consistent application by lower courts.[136]

The Court has fleshed out these factors that unsettle precedent in subsequent cases. The Court has looked to acquiescence by the Justices, such as whether there is a divided court or dissent,[137] or whether the precedent was questioned in later decisions.[138] It has looked to whether the precedent was well-reasoned,[139] whether the series of precedents is consistent or conflicting,[140] or whether the precedent has "defied consistent application by the lower courts."[141] The Court has also looked to criticism by the lower court, scholars, and the Bar.[142]

603, 617–18 (1999); *see also* Randall v. Sorrell, 548 U.S. 230, 244 (2006) (plurality opinion) (noting that precedent is more difficult to overcome when the law is "settled through iteration and reiteration over a long period").

[136] *Payne*, 501 U.S. at 828–30.

[137] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64 (1996) (noting "confusion among the lower courts that have sought to understand and apply the deeply fractured decision"); Nichols v. United States, 511 U.S. 738, 745–46 (1994) (noting the Supreme Court's "splintered decision").

[138] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 240, 242 (2009) (ruling that the *Saucier* sequence was no longer mandatory, allowing the lower courts to apply it at their own discretion).

[139] *See, e.g.*, *Janus*, 138 S. Ct. at 2460 (stating that "*Abood* was poorly reasoned" and caused many negative consequences, leading the Court to reject it).

[140] *See, e.g.*, *Wesby*, 138 S. Ct. at 589–90 (reasoning that precedent must be consistent and that there must be "a robust 'consensus of cases of persuasive authority'" to transform a rule into well-established law); Graves v. Schmidlapp, 315 U.S. 657, 665 (1942) ("[I]f appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the *Wachovia* case must be overruled."); Heath v. Wallace, 138 U.S. 573, 585 (1891) (reasoning that the issue before the Court was "settled by an unbroken line of decisions," which helped the Court reach a decision consistent with this precedent). *See generally* Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 514–17, 523–24, 526, 528, 530, 533, 535–36 (1847) (looking at caselaw to reach a decision that conforms with precedent).

[141] *Pearson*, 555 U.S. at 235 (quoting Payne v. Tennessee, 501 U.S. 808, 829–30 (1991)); *accord* South Carolina v. Gathers, 490 U.S. 805, 813 (1989) (O'Connor, J., dissenting) (stating that "considerable confusion in the lower courts" occurred after a previous ruling was made, causing varied applications in lower courts).

[142] *See, e.g.*, *Pearson*, 555 U.S. at 234 (surveying lower court criticism of the *Saucier* rule); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221, 223 (1995) (reviewing lower court criticism concerning the unclear level of scrutiny needed in equal protection claims); Morse v. Frederick, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) ("[T]he rule of *Saucier* has generated considerable criticism from both commentators and judges."); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47–48, 58 (1977) ("Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts.").

In *Payne*, Justice Scalia observed the importance of settlement in response to Justice Marshall's heated dissent:

> That doctrine [stare decisis], to the extent it rests upon anything more than administrative convenience, is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts. It is hard to have a genuine regard for *stare decisis* without honoring that more general principle as well. A decision of this Court which, while not overruling a prior holding, nonetheless announces a novel rule, contrary to long and unchallenged practice, and pronounces it to be the Law of the Land—such a decision, no less than an explicit overruling, should be approached with great caution. It was, I suggest, *Booth,* and not today's decision, that compromised the fundamental values underlying the doctrine of *stare decisis*.[143]

In *Halliburton Co. v. Erica P. John Fund,* Justice Thomas's concurrence, joined by Justices Scalia and Alito,[144] pointed to several factors that unsettled precedent. Justice Thomas wrote:

> Principles of *stare decisis* do not compel us to save *Basic*'s muddled logic and armchair economics. We have not hesitated to overrule decisions when they are "unworkable or are badly reasoned," [citing *Payne*]; when "the theoretical underpinnings of those decisions are called into serious question," [citing *State Oil Co. v. Khan*]; when the decisions have become "irreconcilable" with intervening developments in "competing legal doctrines or policies" [citing *Patterson*]; or when they are otherwise "a positive detriment to coherence and consistency in the law." Just one of these circumstances can justify our correction of bad precedent.[145]

In *Arizona v. Rumsey* in 1984, the Court first announced that "special justification" is needed to overturn precedent.[146] But it is necessary to point out the limits of *Rumsey*, where the Court said that

---

[143] *Payne*, 501 U.S. at 834–35 (Scalia, J., concurring).
[144] 573 U.S. 258, 297–98 (2014) (Thomas, J., concurring).
[145] *Id.* (internal citations omitted).
[146] 467 U.S. 203, 212 (1984).

departure from *settled* precedent requires "special justification."[147] In *Ramos v. Louisiana*, Justice Kavanaugh understood "special justification" to mean a reason (an additional stare decisis factor) more than simply judicial error—in other words, "that the precedent was wrongly decided."[148]

There are three other major decisions of the past quarter century that bear on settled precedent. First, in *Dickerson v. United States*, a majority held, over the dissent of Justice Scalia (joined by Justice Thomas), that *Miranda* was settled and workable, choosing, in effect, "settled law" over being "right."[149]

Second, Chief Justice Robert's concurrence (joined by Justice Alito) in *Citizens United v. FEC* referenced several factors that unsettle precedent, invoking the *Helvering-Adarand* doctrine to justify overturning unsettled doctrine and "returning" to a more coherent doctrine:

> Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.[150]

In the third case, *American Legion v. American Humanist Ass'n*,[151] the *Lemon* test was deemed unsettled. Justice Alito wrote for the 7-2 majority:

---

[147] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) (quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015)); *Halliburton*, 573 U.S. at 266 (reaffirming the need for "special justification" to overrule precedent that has been settled); Randall v. Sorrell, 548 U.S. 230, 244 (2006) (same).

[148] 140 S. Ct. 1390, 1413–14 (2020) (Kavanaugh, J., concurring in part) (quoting Allen v. Cooper, 140 S. Ct. 994, 1003 (2020)).

[149] *See* 530 U.S. 428, 443 (2000) (arguing that there is no "special justification" to overturn *Miranda*, especially since it is so imbedded in "our national culture"). Scalia dissented, arguing that relying on stare decisis improperly "impos[ed] extraconstitutional constraints upon Congress and the States," contrary to the text of the Constitution. *Id.* at 464–65.

[150] 558 U.S. 310, 377–79 (2010) (Roberts, C.J., concurring).

[151] 139 S. Ct. 2067, 2080 (2019).

> After grappling with such cases for more than 20 years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decision-making. That test, as noted, called on courts to examine the purposes and effects of a challenged government action, as well as any entanglement with religion that it might entail.[152]

The Court noted several reasons why *Lemon* is unsettled, even though that word was never used.[153] These decisions, when combined, reflect many of the factors that prevent the settlement of a precedent.

II. FACTORS THAT MAY SETTLE A DECISION

When judges and scholars discuss stare decisis, the virtues that are often invoked are stability, reliability, and consistency. These are sometimes argued to resist overturning any precedent, but the precedent must first be settled before it can lead to these virtues.

A. Acquiescence

If a decision is unsettled by agitation from various quarters, then the first factor that tends to settle or unsettle a decision is acquiescence or agreement by the court. Acquiescence is a long-standing, essential element of settled law.

It was the understanding of Chief Justice Marshall and the rest of the Marshall Court—in contrast to President Thomas Jefferson—that the authority of the Court, and of precedent, was strengthened by the Court speaking with one voice, rather than the practice of seriatim opinions that preceded the Marshall Court.[154]

That notion of one voice is implicit in the Supreme Court's desire to secure the largest possible majority of Justices (if not unanimity) in each case. But that is not invariably so. *Dred Scott v. Sanford* and *Roe v. Wade* were decided by 7-2 majorities. And a single, strong dissent from an 8-1 decision has sometimes been relied upon by a later court to overturn that precedent.[155] This shows why it was an egregious

---

[152] *Id.* at 2080–81.

[153] *Id.* ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. . . . This pattern is a testament to the *Lemon* test's shortcomings.").

[154] UROFSKY, *supra* note 9, at 47, 49.

[155] Blaustein & Field, *supra* note 105, at 176, 184 (1958). In *West Virginia Board of Education v. Barnette*, three Justices changed their opinions and overruled *Minersville School District v. Gobitis*—an 8-1 ruling issued just three years prior. *Id.*

mistake for Justices Douglas and Brennan to think that they could rush to settle the abortion issue in the fall of 1971 with a temporary 4-3 majority before the Black and Harlan vacancies could be filled.[156]

The Court has also looked to acceptance by lower courts, the bar, the executive branch, Congress, or public opinion.[157] In *Stuart v. Laird*, the dismissal of circuit court judges was challenged after the Judiciary Act of 1801 was repealed by a new Republican-dominated Congress through the Judiciary Act of 1802.[158] Justice Patterson, writing for a unanimous Court, upheld the dismissal:

> To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.[159]

---

[156] *See* CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 18–19, 43–44 (2013) [hereinafter ABUSE OF DISCRETION] (stating that, at the time, the two Supreme Court vacancies were an incentive for Justices Douglas and Brennan to rule on *Roe* and *Doe* quickly, while in hindsight, other Justices, such as Justice Blackmun, believed the decision to be a rash error).

[157] *See, e.g.*, United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812) ("Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition."); Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 325 (1853) ("[*Letson*] has, for the space of ten years, been *received by the bar* as a final settlement of the questions which have so frequently arisen under this clause of the Constitution." (emphasis added)); Pearson v. Callahan, 555 U.S. 223, 235 (2009) ("Where a decision has 'been questioned by Members of the Court in later decisions . . .' these factors weigh in favor of reconsideration."). *See generally* GARNER ET AL., *supra* note 64, at 182–93 (analyzing unanimous versus split decisions). State courts, too, have looked at acquiescence. *See* Rockhill v. Nelson*,* 24 Ind. 422, 424–25 (1865) ("The cases . . . were decided some six or seven years ago, and the rule therein established has been acquiesced in by the legislature through three general, and one special, sessions, and ought not now, in our opinion, to be disturbed by this court."); South's Heirs v. Thomas' Heirs, 23 Ky. (7 T.B. Mon.) 59, 63 (1828) ("The acquiescence of the community in the decision, may also be used as an argument. There has been a succession of judges on the bench, except as to one member of the court. Yet there has been no conflicting decision, and the legislature, who has the statute of limitations in their power, have never attempted so to reform it, as to get clear of the construction given to it by the court below, twelve or thirteen years since.").

[158] 5 U.S. (1 Cranch) 299, 307–09 (1803).

[159] *Id.* at 309. For other endorsements of acquiescence, see, for example,

He reasoned that the practice of Supreme Court justices sitting as circuit judges had received acquiescence and was settled by contemporaneous exposition.

The Supreme Court has rarely, if ever, said that a single decision is necessarily and immediately binding as horizontal precedent. Indeed, individual justices have refused to give binding effect to a majority decision and permanently dissented from the precedent.[160] Therefore, acquiescence may be eliminated by one dissent, and a decision may be unsettled by one memorable dissent.[161]

Although dissents were uncommon during the Marshall Court, the Court noted early on that a precedent was less weighty in the case

---

Markman, *supra* note 53, at 268 ("These factors include consideration of the extent to which the legislature can properly be said to have 'acquiesced' in an interpretation by having specifically revisited a statutory provision and chosen not to have amended it.").

[160] *See Justice Kagan Remarks at Georgetown University Law Center*, C-SPAN (July 18, 2019), https://www.c-span.org/video/?462748-1/justice-kagan-remarks-georgetown-university-law-center (interviewing Justice Kagan about her "powerful" dissenting opinions, beginning at 27:02); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 79 (1993) (Scalia, J., concurring in part and concurring in judgment) (recording his continued dissent from "our negative Commerce Clause jurisprudence"); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 207 (1863) (Miller, J., dissenting) ("I should have contented myself with the mere expression of dissent, if it were not that the principle on which the court rests its decision is one, not only essentially wrong, in my judgment, but one which, if steadily adhered to in future, may lead to consequences of the most serious character."); Gaines v. Hennen, 65 U.S. (24 How.) 553, 631 (1860) (Grier, J., dissenting) ("I wholly dissent"); The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 156 (1854) (Daniel, J., dissenting) ("to maintain my own consistency"); Ohio Life Ins. & Tr. Co. v. Debolt, 57 U.S. (16 How.) 416, 442 (1853) (opinion of Catron, J.) ("guard myself against being committed in any degree to the [majority's] doctrine").

[161] *See* Blaustein & Field, *supra* note 105, at 186 (dissenting opinion by Justice Harlan in *Plessy v. Ferguson*'s 7-1 decision, which was later overruled by *Gayle v. Browder*'s 9-0 per curiam decision); *id.* at 184 (dissenting opinion by Justice Stone in *Gobitis*'s 8-1 decision, which was overruled by *Barnette* three years later); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 89 (1872) (Field, J., dissenting) (arguing that the Fourteenth Amendment protects against the deprivation of rights at both the national and state level); UROFSKY, *supra* note 9, at 65, 69 (stating that Justices McLean's and Curtis's dissents in *Dred Scott* were the most important dissenting opinions up to 1858); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (disparaging the *Lemon* test as a "ghoul in a late-night horror movie"); Morrison v. Olson, 487 U.S. 654, 658 (1988) (recording Scalia as the lone dissenter in a 7-1 decision); Solorio v. United States, 483 U.S. 435, 436, 440–41 (1987) (approving Justice Harlan's dissent in *O'Callahan v. Parker* and stating "the service connection test announced in that decision should be abandoned"); Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (referencing Justice Brandeis' "famous dissent" in *Olmstead v. United States*); Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (relying on Justice Harlan's dissent in *Poe v. Ulluman*); Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1383 (1984) (stating that the most memorable opinions made by Justice Holmes were his dissenting opinions in *Abrams v. United States* and *Lochner v. New York*).

of a "divided" court.[162] Justices Curtis and McLean's dissents in *Dred Scott* were likely the most significant of all dissents before the Civil War.[163] Modern decisions have also looked to the significance of a divided court.[164] Upon Justice Ginsburg's death, President Clinton issued a public statement, remarking, "Her powerful dissents . . . reminded us that we walk away from our Constitution's promise at our peril."[165]

A divided court will force an issue to remain unsettled. The *Payne* Court emphasized that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts."[166]

In *Etting v. Bank of the United States*, the Court recognized that they were, yet again, faced with a split vote, and therefore "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it."[167] In *Harmelin v. Michigan*, the Court recognized the problems of split decisions: "It should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law. We have long recognized, of

---

[162] Antonin Scalia, *Dissents*, 13 OAH MAG. HIST. 18, 18 (1998); *see also* Gordon v. Ogden, 28 U.S. (3 Pet.) 33, 34 (1830) ("Although that case was decided by a divided court . . . .").

[163] UROFSKY, *supra* note 9, at 65, 69.

[164] Alleyne v. United States, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) ("[A] decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality.'" (final alteration in original)); IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005) (stating that stare decisis is particularly strong when there has been unanimous acceptance of "settled law for several decades"); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 725–27 (2002) (reaching unanimous decision of precedent in patent law); Citizens United v. FEC, 558 U.S. 310, 380 (2010) (Roberts, C. J., concurring) (pointing to "two 'spirited dissents'" that have been the cause of many disputes in the Supreme Court); Nichols v. United States, 511 U.S. 738, 741, 746 (1994) (stating that the splintered decision in *Baldasar* caused the lower court to apply the decision narrowly); Harmelin v. Michigan, 501 U.S. 957, 962–65 (1991) (Scalia, J., writing for the majority) (stating that precedent is not completely settled, particularly when it is both recent and conflicts with other prior decisions); Thomas v. Wash. Gas Light Co., 448 U.S. 261, 267 & n.11, 273 (1980) (Stevens, J., writing for the majority) (referring to 5-4 decisions as "tenuous majorit[ies]").

[165] Press Release, Bill Clinton, President, United States, Statement from President Clinton on the Passing of Justice Ruth Bader Ginsburg (Sept. 18, 2020), https://www.clintonfoundation.org/press-and-news/general/statement-president-clinton-passing-justice-ruth-bader-ginsburg/.

[166] Payne v. Tennessee, 501 U.S. 808, 828–30 (1991).

[167] 24 U.S. (11 Wheat.) 59, 78 (1826).

course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents."[168]

According to Judge Henry J. Friendly, who clerked for Justice Brandeis, the Justice took a "philosophical attitude . . . toward constitutional decisions he very much disliked. . . . '*A future Court will find no trouble in overruling or disregarding these decisions. The important thing is always to dissent and thus to keep the controversy alive.*'"[169]

B. Age

The Supreme Court has, from time to time, cited "the antiquity of the precedent" as a factor in stare decisis.[170] While age is a consideration, it may not be a decisive factor. The Supreme Court has overruled its prior decisions in at least 141 cases of constitutional law, some which were decades old.[171] *West Coast Hotel v. Parrish*, overruled the decades-old doctrine of *Lochner v. New York*,[172] which had been upheld just fourteen years earlier.[173] In *Erie Railroad Co. v. Tompkins*, the Court overruled the doctrine of *Swift v. Tyson*[174] despite Justice Butler's judgment that it had "been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then only by a single judge."[175]

In conjunction with age, other factors have sometimes persuaded the Justices to overturn old precedents due to "the erosion of time, and [the Supreme Court Justices] are of opinion that it is no longer controlling."[176] Legal rules also may be eroded by changes in social, economic, technological or legal conditions.[177] The Supreme Court has concluded that some cases are "product[s] of another time" and has gone as far as overruling a 126-year-old decision because the law in the

---

[168] 501 U.S. at 965.

[169] Henry J. Friendly, *Time and Tide in the Supreme Court*, 2 CONN. L. REV. 213, 214 (1969) (emphasis added). Judge Friendly believed that *severe* criticism of the Court was "entirely proper." *Id.*

[170] Citizens United v. FEC*,* 558 U.S. 310, 362–63 (2010) (quoting Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009)).

[171] BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 27–28, 50 (2018).

[172] Lochner v. New York, 198 U.S. 45 (1905).

[173] W. Coast Hotel v. Parrish, 300 U.S. 379, 392 (1937).

[174] 41 U.S. (16 Pet.) 1 (1842).

[175] Erie v. Tompkins, 304 U.S. 64, 79–80, 82, 84 (1938).

[176] Tigner v. Texas, 310 U.S. 141, 147 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), a decision that was 38 years old).

[177] *See* Lawrence E. Blume & Daniel L. Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405, 409–10 (1982) (stating that by sacrificing stare decisis, we keep up with changing societal behavior, but we do so at the cost of having uncertain legal precedent).

earlier case was "fundamentally incompatible with more than a century of constitutional development."[178]

Experience can only come with time, and time may show that the original premises were erroneous or that the rule is unworkable. Due to the nature of the judicial system and how it is affected by media and politics, considerable time may pass before the courts, States, or public may realize the unworkability of a decision and its negative impact on the implementation of law. With time, evidence may appear that show the Supreme Court's decision has a negative impact, is unworkable, or that the decision has aggravated the problem rather than solved the issue. As Justice Brandeis wrote in his *Burnet* dissent, "The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[179] Therefore, the longevity of a precedent alone does not make an issue settled.

C. A Series of Consistent Decisions Reaffirming the Rule

State and federal decisions have long affirmed that a single decision does not necessarily settle the law. Justice Ginsburg, in *American Airlines v. Wolens*, reiterated that settled law sometimes requires more than one decision: "we do not overlook that in our system of adjudication, principles seldom can be settled 'on the basis of one or two cases, but require a closer working out.'"[180] Precedential status may not be immediate; often it is gradual, as judges and scholars have observed.[181]

Sometimes reaffirmation can be confused with re-application.[182] A line of decisions with reevaluation and reaffirmation on the merits—rather than simply repeated application—may lead to settlement.

Judges believe "a series of [consistent] decisions could settle the law in a way that individual judges would not dare to reject;" uniform decisions may demonstrate the correctness of a particular rule that

---

[178] Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987).

[179] Burnet v. Coronado Oil & Gas Co., 285 U.S. 389, 407–08 (1932) (Brandeis, J., dissenting); *accord* Pearson v. Callahan, 555 U.S. 223, 233 (2009) (stating that precedent may be departed from if "experience has pointed up the precedent's shortcomings").

[180] 513 U.S. 219, 234–35 (1995) (quoting Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 339 (1940) (discussing that several cases are needed to develop judicial precedent before the rule can become settled)).

[181] *See* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 135–36 (2015) (arguing that even recent opinions should hold similar precedential value as longer-standing cases).

[182] *Id.* at 135 ("[M]ust constitutional law develop more gradually through judicial reaffirmances—or at least repeated applications—over the course of time?").

judges would otherwise overrule as erroneous.[183] Additionally, people trust a series of decisions over an individual opinion, believing that multiple judges conduct independent analyses and do not just blindly follow their predecessors.[184]

The Supreme Court has deferred to state law consistency and reaffirmation when determining whether the law has been settled.[185] In *Bank of the United States v. Daniel*, the Court stated that "in accordance to a *steady course of decision* for many years" it was its "incumbent duty carefully to examine and ascertain if there be a settled construction by the state courts . . . and to abide by, and follow such construction, when found to be settled."[186]

Livingston's Executrix v. Story, a property case involving a dispute between a borrower and a lender, may be the first Supreme Court decision in which the Latin maxim "stare decisis" was cited by name, though abbreviated.[187] The Court held that English equity jurisprudence applied—rather than the civil law of Louisiana—because the law had been settled by English jurisprudence and applied through a series of consistent state decisions.[188]

In *Wallace v. M'Connell,* a property case involving promissory notes, Justice Thompson wrote the opinion for the Court, broadly declaring, "It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions."[189] Justice Thompson turned to state courts, including New York, where he found that "the law in that state for the last thirty years, has been considered as settled upon this point."[190] Justice Thompson concluded, "After such *a uniform course of decisions* for at least thirty years, it would be inexpedient to change the rule."[191] Uniform and consistent decisions tend to settle the law and create a presumption against overruling.

---

183 Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 34–35 (2001).

184 *Id.* at 36.

185 *E.g.*, Bank of the U.S. v. Daniel, 37 U.S. (12 Pet.) 32, 53–54 (1838).

186 *Id.* (emphasis added); *see also* Leffingwell v. Warren, 67 U.S. (2 Black) 599, 603 (1862) (reaffirming the settled principle that "[i]f the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this Court will follow the latest settled adjudications").

187 36 U.S. (11 Pet.) 351, 400 (1837).

188 *Id.* at 371.

189 38 U.S. (13 Pet.) 136, 149–50 (1839).

190 *Id.* at 147–48.

191 *Id.* at 150 (emphasis added).

D. Investigated Thoroughly and with Care

A point of law can be settled only if it is "investigated [thoroughly and] with care and considered in its full extent."[192] Justice Souter wrote: "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute, . . . and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument."[193]

To achieve just decisions, the Supreme Court has often refused to adjudicate issues that lack adequate briefing and argument.[194] From its earliest days, the Court has emphasized the importance of thorough, deliberate proceedings and accurate facts in its adjudications.[195] The Court in *United States v. Percheman* noted that important facts were not before the Court in its earlier, erroneous decision.[196] Additionally, the Justices in concurrences and dissents frequently "criticize the majority for taking up issues the briefs did not address or treated in a cursory fashion."[197] Majority and non-majority opinions clearly place substantial importance on briefing and argument thereby demonstrating "recognition that the quality of briefing affects the quality of the Court's opinions; inadequate briefs can produce poor decisions."[198]

The Supreme Court has denied precedential effect to earlier opinions where the Court has determined the opinions relied on inadequate briefing and argument.[199] In *KVOS v. Associated Press*, the Court stated that in an earlier case "the answer did not challenge the jurisdiction, there was no assignment of error raising the question and no argument on the subject was presented to this court."[200] In *Williams v. United States*, the Court rejected an opinion that did not mention the cases it was supposed to disprove when the earlier decision held

---

[192] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821).

[193] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in judgment) (internal citation omitted) (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)).

[194] Beck, *Transtemporal Separation*, *supra* note 53, at 1420.

[195] *See id*. (stating that "Justices often refuse to adjudicate issues . . . in the absence of adequate briefing and argument"); *see also, e.g.,* United States v. Percheman, 32 U.S. (7 Pet.) 51, 94–96 (1833) (arguing that early on in the Supreme Court's history, the Court carefully examined "things well understood by the parties, but not understood by the court" before it issued a decision).

[196] *See* 32 U.S. at 88–89, 95 (stating that papers translated from a foreign language should be carefully examined when the decision will determine whether an officer be granted powers that exceed their authority).

[197] Beck, *Transtemporal Separation*, *supra* note 53, at 1420–21.

[198] *Id.* at 1421–22.

[199] *See, e.g.*, *Percheman*, 32 U.S. at 89, 95 (relying on the conclusion that important facts were not before the Court in its earlier, erroneous decision).

[200] 299 U.S. 269, 279 (1936).

that the issue was moot even though the briefs showed the question was not mooted.[201] In *Casey*, the plurality argued that a decision may be reversed when the decision "rest[s] on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[202]

A decision that relies on inadequate briefing and argument can be given less weight in a subsequent decision or it can be read more narrowly than the holding intended.[203] The Court's rationale for doing so is that stare decisis is supposed to save the Court work by "eliminating the need for extended analysis of a legal issue previously resolved by the judiciary."[204] If a decision is not investigated with care and properly briefed, then the legal analysis and judicial opinions may be flawed and inadequate. But when a decision is properly briefed and argued, a judge is better able to "produce thoughtful rulings, truthful about the relevant facts, faithful to the applicable law, and useful in accomplishing the goals the legal system seeks to advance."[205]

Therefore, "requiring courts to rely on the work of their predecessors makes less sense if we have reason to distrust the legal analysis in the earlier opinion."[206] A decision should not be accorded the weight and respect of stare decisis if the Court's rationale and effort in defending the outcome is flawed.[207] Stare decisis is affected by "incomplete or superficial analysis."[208] Well written decisions that rely on solid research that lead to a settled decision should be afforded stare decision weight.[209] However, when an opinion that "is cursory or simplistic, failing to grapple with complexities of an issue or consider possible counterarguments, we have less reason for confidence that the court did the work necessary to reach a reliable conclusion and therefore less reason to defer to the Court's decision."[210]

E. A Well-Reasoned Decision with Clear Rules

The Court will look at an earlier decision to determine if the decision is well-reasoned or to see if it still agrees with the prior

---

[201] 289 U.S. 553, 570 (1933).

[202] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–64 (1992) (plurality opinion) (analyzing the reversal of *Lochner* and *Plessy* to determine if a similar change in factual understanding existed to overturn *Roe v. Wade*).

[203] Beck, *Transtemporal Separation*, *supra* note 53, at 1437 (using *Hohn*, *Katz,* and *Heller* as examples).

[204] *Id.* at 1437–38.

[205] *Id.* at 1426.

[206] *Id.* at 1437–38.

[207] *Id.* at 1445–47.

[208] *Id.* at 1445.

[209] *Id.* at 1410.

[210] *Id.* at 1445.

reasoning.[211] For example, in *West Virginia State Board of Education v. Barnette*, the Court overruled a decision that was only three years old, stating that the prior decision's rationale was flawed.[212] In *Janus v. American Federation of State, County & Municipal Employees, Council 31*, the Court overturned a 40-year-old precedent because the decision was "poorly reasoned" among several other factors.[213]

Not only should the decision be well-reasoned, but it should also be finalized. Law is unsettled by substantive changes in future edits of decisions.[214] Justices publish an initial opinion and then continue to revise it over a course of months and sometimes even years.[215] There are several types of errors the Court may correct in its decisions: (1) "Typographical, Spelling, Grammar, and Citation Errors;" (2) "Word Additions, Deletions, and Substitutions;" and (3) "Erroneous Characterizations of Facts, the Record, the Positions of the Parties, the Positions of the Other Justices, Background Law, and the Court's Opinion[s]."[216]

If a justice adjusts or changes a word, "the changes could have significant substantive import."[217] In a "highly controversial case[]," *Perry v. United States*, Chief Justice Hughes substituted "could have" for "has."[218] While it appears like a minor edit, it was later determined that "[t]he Chief's ex post facto revision affected 'an integral part of the opinion.'"[219] Category three can also lead to substantive problems as "Justices commit errors of all varieties in such factual assertions."[220] Some Justices have actually misquoted key opinions or misstated background law—all of which can have a substantive impact.[221]

---

211 *Id.* at 1443, 1445–46; BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 12–13 (2018).

212 319 U.S. 624, 625, 635–36, 642 (1943) ("We . . . reexamine [the] specific grounds assigned for the *Gobitis* decision.").

213 138 S. Ct. 2448, 2459–60 (2018).

214 *See* Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 544 (2014) (noting that "Supreme Court opinions are legally effective as soon as they are first announced").

215 *Id.* at 542–44.

216 *Id.* at 562–63, 566.

217 *Id.* at 564–65.

218 *Id.* at 565.

219 *Id.*

220 *Id.* at 566–69.

221 *Id.* at 567–68, 568 nn.159–60; Nina Totenberg, *'*Hamdan v. Rumsfeld*': Path to a Landmark Ruling*, NPR (Sept. 5, 2006, 12:01 AM), https://www.npr.org/templates/story/story.php?storyId=5751355 (describing one of the misquoted cases, *Hamdan*, as a landmark case); Damon Root, *Stephen Breyer Makes the Liberal Case Against Court Packing*, REASON (Sept. 2, 2021, 11:52 AM), https://reason.com/2021/09/02/stephen-breyer-makes-the-liberal-case-against-court-packing/ (noting that another one of the misquoted cases, *Boumediene*, would "go down in the books as one of the most significant modern rulings against wartime government power").

Currently, the Supreme Court releases its finalized opinions about four to five years after it decides the case.[222]

Another important factor to settlement that comes from well written opinions is clear rules, standards, and tests. If a decision is well written, then there should be limited future litigation around the application.[223] Adherence to precedent is good because it makes for stability and predictability. But vague and unpredictable tests cannot provide stability and predictability and, therefore, do not deserve strong respect as precedents.[224] Therefore, a decision cannot be settled if the decision is not only poorly written but also fails to provide clarity. This can lead to confusion in lower courts and lack of consistent application throughout the judiciary.

F. Actual Practice of the United States Departments, Federal Courts, and States

The Supreme Court may state a decision is binding precedent with the force of stare decisis. However, the Court has no implementation authority and relies on lower courts and federal and state governments to respect its authority and implement its decisions.[225] Depending on the decision, the actual practice of these institutions has varied. Experience shows that "the more a judicial opinion is supported by executive action and deference, and by subsequent congressional legislation, the greater the likelihood that succeeding courts will

---

[222] Lazarus, *supra* note 214, at 608.

[223] *See* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78–80 (1993) (Scalia, J., concurring in part and concurring in judgment) (noting that the "principal purposes of *stare decisis* . . . are to protect reliance interests and to foster stability in the law," but that these ends are not properly met by certain "vague and open-ended tests" that the Court applies in its negative Commerce Clause jurisprudence); Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & SOC'Y REV. 1027, 1030, 1030 nn.4–5 (2011) (discussing how rules bring clarity and may limit future litigation, whereas standards "require judges . . . to make decisions on a case-by-case basis," producing an unpredictability that may lead to increased needless litigation).

[224] *See Itel Containers*, 507 U.S. at 78–80 (Scalia, J., concurring in part and concurring in judgment) (criticizing certain "vague and open-ended tests" that are too uncertain to be respected as precedent).

[225] *See* Charles A. Johnson, *Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination*, 23 AM. J. POL. SCI. 792, 792 (1979) (noting how studies demonstrate that "lower courts may ignore Supreme Court decisions, often with impunity"); James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RSCH. Q. 567, 570, 582 (1997) (explaining what Spriggs believes to be the driving force behind government agencies' decisions to comply or not with Supreme Court opinions, and that federal bureaucracies comply the vast majority of the time with state bureaucracies appearing to comply less than their federal counterparts).

endorse the holding."[226] It is especially important when the legislation and court decisions are in agreement and have "spoken too frequently and too explicitly" upon the question "to be disregarded at this day."[227]

Precedents by the Court have been overturned when they are "questioned by Members of the Court in later decisions and have defied consistent application by the lower courts."[228] Some argue that a precedent cannot become a "superprecedent . . . unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress."[229]

Grant v. Raymond confirmed that the acquiescence of the executive departments was a factor settling the law.[230] In an opinion by Chief Justice Marshall, the majority concluded that the law had been settled by *Pennock v. Dialogue*.[231] The Chief Justice stated that the executive departments "have acted on the construction adopted by the circuit court, and have considered it as settled."[232] He emphasized that they would stand by the precedent because the case was not of first impression and the issue was "now well settled."[233]

The Court itself knows and understands the importance of the public and government's role in affording a decision stare decisis effect. *Casey*, decided 19 years after *Roe*, begged those involved in this "intensely divisive controversy" "to end their national division by accepting a common mandate rooted in the Constitution."[234] In a desperate attempt to uphold a crumbling façade, the Court pleaded with the public and government to agree with them that *Roe v. Wade* was settled.[235]

Some will argue that it is only natural for the public not to comply with judicial decisions. Indeed, research shows that "judges and police officers have difficulty securing compliance with a wide variety of laws and legal decisions. . . . Similarly, the Supreme Court has had difficulties securing compliance with a wide variety of decisions, including those on school desegregation, school prayer, and freedom of

---

[226] Richard J. Dougherty, *Originalism and Precedent: Principles and Practices in the Application of Stare Decisis*, 6 AVE MARIA L. REV. 155, 166 (2007).

[227] *See* City of Bridgeport v. Housatonuc R.R. Co., 15 Conn. *475, *496 (1843) (noting that the legislative and jurisprudential history of retroactive laws is too established to be disregarded).

[228] Payne v. Tennessee, 501 U.S. 808, 828–30 (1991).

[229] Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1293 (2008). "Superprecedent" is a status of case law that is "practically immune to reconsideration." *Id.* at 1292.

[230] 31 U.S. (6 Pet.) 218, 244 (1832).

[231] *Id.* at 231, 238.

[232] *Id.* at 244.

[233] *Id.* at 246–47.

[234] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844, 866–67 (1992).

[235] *Id.* at 845–46, 860–61; *id.* at 870 (plurality opinion).

speech for extremist groups."[236] However, over time, due to a combination of judicial decisions, federal support, and public acceptance, a decision can become settled even if initially controversial.

For instance, in *West Coast Hotel* and *Brown v. Board of Education*, the branches of the federal government did indeed support these controversial public decisions.[237] The support was true and genuine and led to settlement.[238] The Supreme Court in those two cases also provided "a degree of clarity and finality," which permitted the federal government to accept the law as settled and have actual application guidelines.[239]

> The 1937 line of cases initiated by *West Coast Hotel* were reaffirmed sharply in the following years, and within just a few short years unanimously. *Brown v. Board of Education* was a unanimous decision by the Court, and though implementation of *Brown* would take substantial further effort, the decision marked the end of the line for any serious constitutional defenses of segregation or violations of equal protection.[240]

There are areas of the law which are considered so well settled by government agencies that the Court would not be able to overrule certain principles even if they lawfully found a reason. For instance, if the Court tried to hold Social Security as unconstitutional, it "would exceed its lawful authority" as it is well known that all public authorities and institutions "have accepted, at least implicitly, the constitutionality of Social Security as a settled matter."[241]

Issues that are considered "settled" must have the support of both nonjudicial authorities and the Court. It is these bodies that "have heavily invested in their closure" through continuous affirmation by the Court and governmental programs to garner public support.[242] However, when "an issue remains genuinely contested, and the several

---

[236] Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 717 (1994).

[237] Dougherty, *supra* note 226, at 162–64.

[238] *Id.* at 163–64.

[239] *Id.* at 164.

[240] *Id.*

[241] Gerhardt, *supra* note 229, at 1293; Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008).

[242] *See* Gerhardt, *supra* note 229, at 1294–95 (stating that this investment by nonjudicial authorities and the Court is responsible for the firm settlement of constitutional issues).

branches of government legitimately and in good faith continue to disagree, the issue *should* remain unsettled."[243]

III. REASONS WHY *ROE V. WADE* REMAINS UNSETTLED

A. Has Roe *Ever Been Settled?*

A decision is unsettled due to agitation that may come from several sources, including dissenting Justices, lower court judges, legislatures, the legal community, legal scholars, or the public. *Roe v. Wade* has been a controversial decision since January 1973.[244]

The controversy started with the two original dissents. Dissents negate acquiescence. Justices White and Rehnquist's two dissents went to the heart of *Roe*.[245] With the dissents came national outcry and criticism.[246]

Roe sparked a constitutional crisis. Numerous constitutional amendments to overturn the abortion decisions were quickly introduced in Congress.[247] Hearings were held, and the amendments were debated between 1973 and 1983.[248] A second constitutional crisis erupted when Congress enacted the Hyde Amendment in 1976, resulting in four years of litigation, until the Court retreated in *Harris v. McRae*.[249]

The Court's majority in favor of *Roe* shrunk from 7-2 to 6-3 to 5-4 by *Thornburgh v. American College of Obstetricians & Gynecologists*,[250] then to 4-1-4 in *Webster v. Reproductive Health Services*.[251] For the 33 years since *Webster*, virtually all abortion decisions, except *Ayotte v.*

---

[243] Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2739 (2003).

[244] Jack M. Balkin, *Preface* to WHAT ROE V. WADE SHOULD HAVE SAID, at ix–x (Jack M. Balkin ed., 2005).

[245] Roe v. Wade, 410 U.S. 113, 172–74 (1973) (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221–23 (1973) (White, J., dissenting) (writing a dissent that has reasoning applicable to *Roe* as well).

[246] Jack M. Balkin, Roe v. Wade*: An Engine of Controversy, in* WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 9, at 3.

[247] JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 180, 183–85 (1979); Nat'l Comm. for a Hum. Life Amend., *Human Life Amendments: Major Texts*, HUM. LIFE ACTION 1–3, 5–6 (Feb. 6, 2004), https://www.humanlifeaction.org/downloads/sites/default/files/HLAmajortexts.pdf.

[248] National Committee for a Human Life Amendment, *Human Life Amendment Highlights: United States Congress (1973-2003)*, HUM. LIFE ACTION (Feb. 6, 2004), https://www.humanlifeaction.org/downloads/sites/default/files/HLAhghlts.pdf.

[249] 448 U.S. 297, 303–06, 305 n.6, 326–27 (1980).

[250] 476 U.S. 747 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); *Roe*, 410 U.S. 113.

[251] 492 U.S. 490 (1989).

Planned Parenthood of Northern New England,[252] have been closely divided, usually 5-4 decisions.

Roe changed not just abortion but American law and politics and the judicial nomination process by nationalizing the abortion issue.[253] For example, the first chapter of David O'Brien's 1986 book, *Storm Center: The Supreme Court in American Politics*—based on his time as a Judicial Fellow at the Supreme Court—was on the abortion controversy that had engulfed the Court.[254]

In the run-up to the arguments in *Webster*, the *ABA Journal* published an article suggesting that *Roe* might be overturned in *Webster*.[255] In September 1988, Justice Blackmun told law students he suspected *Roe* would be overturned by *Webster*.[256] In 1989, Justice Scalia's opinion in *Webster* noted that the "carts [were] full of mail from the public, and streets [were] full of demonstrators."[257] Justice O'Connor, in her separate opinion, predicted that *Roe* would likely be reconsidered in the future.[258]

In the wake of *Webster*, Utah, Louisiana, and Guam passed broad limits on abortion which were quickly challenged and enjoined.[259]

---

[252] 546 U.S. 320, 323 (2006) (unanimous court).

[253] *See e.g.*, TED CRUZ, ONE VOTE AWAY: HOW A SINGLE SUPREME COURT SEAT CAN CHANGE HISTORY 91 (2020) ("On January 22, 1973, the Supreme Court and judicial nominations fundamentally changed, and the character of our electoral democracy was profoundly altered."); NOONAN, *supra* note 247, at 1–3; Randy Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735, 736–38, 748–49 (2012) (discussing the controversy and backlash that has occurred because of *Roe*'s broad decision and hypothesizing about what might have occurred if the Court had issued a more modest ruling).

[254] DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, at xvii, 1, 3, 29–31 (5th ed. 2000).

[255] Paul Reidinger, *Will* Roe v. Wade *Be Overruled?*, A.B.A. J., July 1, 1988, at 66, 68, 70; *see also At Issue: Overturn* Roe v. Wade?, A.B.A. J., Jan. 1, 1988, at 32, 32–33 (featuring a debate between Congressman Henry Hyde and Kate Michelman); Henry Reske, *Abortion Revisited*, A.B.A. J., May 1989, at 60, 60–61 (discussing the push for and prospect of *Roe* being overturned by the impending *Webster*).

[256] Associated Press, *Blackmun Says Abortion Ruling May Be Voided*, L.A. TIMES (Sept. 14, 1988, 12:00 AM), https://www.latimes.com/archives/la-xpm-1988-09-14-mn-1921-story.html ("The next question is: 'Will Roe vs. Wade go down the drain?' I think there's a very distinct possibility that it will—this term. You can count the votes."); Liz Schevtchuk, *Justice Says Year Could Mark Reversal of Abortion Decision*, COURIER-J., Sept. 22, 1988, at 4 (reporting that Justice Blackmun told law students in September 1988 that he thought there was "a very distinct possibility" that *Roe* would "go down the drain").

[257] Webster v. Reprod. Health Servs., 492 U.S. 490, 490, 535 (1989) (Scalia, J., concurring).

[258] *Id.* at 526 (O'Connor, J., concurring) ("When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*.").

[259] Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 321–23 (1996); Sojourner v. Roemer, 772 F. Supp. 930, 931 (E.D. La. 1991); Sojourner T v.

Each of these, or the *Hodgson*, *Akron II*, and *Rust v. Sullivan* cases—in which the U.S. Solicitor General called on the Court to overturn *Roe*—were expected to overturn *Roe*.[260]

These expectations were widely held in the run-up to *Casey* in 1992, in which the U.S. Solicitor General again called upon the Court to overturn *Roe*.[261] In 1992, then-Judge Ruth Bader Ginsburg wondered: "Suppose the Court had stopped there [invalidating the Texas prohibition] . . . and had not gone on . . . to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force."[262] She asked, "Would there have been the twenty-year controversy we have witnessed[?]"[263] In other words, nothing the Court did between *Roe* and *Casey* settled *Roe*.

A splintered Court issued *Casey*, and the Plurality's hope to settle *Roe* was crushed.[264] The following year, the standard of review was

---

Edwards, 974 F.2d 27, 28–29 (5th Cir. 1992), *aff'g* 772 F. Supp. 930 (E.D. La. 1991); Jane L. v. Bangerter, 809 F. Supp. 865, 867–68, 880 (C.D. Utah 1992) (stating that the court had "enjoined enforcement of the challenged provisions of the Utah Abortion Acts pending determination of the merits" while concluding that only some provisions were constitutional); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1368–69 (9th Cir. 1992) (affirming the district court's permanent injunction of Guam's anti-abortion act).

[260] Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 148 (1990) (noting how Solicitor General Lee sought a rule in *Akron* that would "effectively overrule[] *Roe*"); Al Kamen, *White House Asks Court to Overturn* Roe v. Wade, WASH. POST (Oct. 14, 1989), https://www.washingtonpost.com/archive/politics/1989/10/14/white-house-asks-court-to-overturn-roe-v-wade/165f80ef-5c98-4e82-8b34-84976090faae/ (quoting Bruce Fein, a conservative analyst, who said "I'm elated," while discussing the Justice Department's brief for *Hodgson*—which aggressively attacked *Roe*—and suggested that *Hodgson* was "an appropriate vehicle to overrule *Roe*").

[261] JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 137, 150–53 (2007) ("It gave the Court a direct opportunity to overrule *Roe*. With Thomas on board, a perceived sixth conservative vote, many inside and outside the Court feared that was inevitable."); *id.* at 152–56 (noting that Solicitor General Starr had argued for Rehnquist's *Webster* approach, which would effectively overrule *Roe*).

[262] Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992).

[263] *Id.*

[264] JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 856 (2006) (referring to *Casey*'s "utter intellectual incoherence"); MARY ANN GLENDON, A NATION UNDER LAWYERS 114 (1994); ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 99, 105, 110, 113 (2001) ("Among the many consequences of [*Casey*'s] defective self-perception is an inability to understand or tolerate the various segments that make up American society."); L.A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2112 (2014) ("*Casey*'s intentional failure to mention what appears to be the principal factor in overruling seriously undermines the credibility of its treatment of stare decisis."); Paul C. Quast, *Respecting Legislators and Rejecting Baselines: Rebalancing* Casey, 90 NOTRE DAME L. REV. 913, 920–21 (2014)

again unsettled with a new "large fraction" test in *Fargo Women's Health Organization v. Schafer*.[265] *Fargo* was followed by the contentious decisions to deny review in *Janklow v. Planned Parenthood of Sioux Falls*[266] and to summarily reverse and remand in *Leavitt v. Jane L.*[267] Two years later, the Court split 6-3 on declining to review Ohio's limit on post-viability abortions, invalidated by the Sixth Circuit, in *Voinovich v. Women's Medical Professional Corp*.[268]

Two years after *Voinovich*, *Stenberg v. Carhart* changed the standard of review again and was fiercely disputed by four dissents.[269] Seven years later, *Gonzales v. Carhart*, another 5-4 decision, is credited as having overruled *Stenberg sub silentio*.[270] After *Gonzales*, many states sought to legislate to the fullest extent possible, and some went

---

(noting that the *Casey* Court was very divided); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 315, 325 (2005) (arguing that *Roe* is still not settled among the people and political branches); Morton J. Horowitz, Forward: *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 74–75, 82–83 (1993) (criticizing the plurality's characterization of Court's prior overruling of *Lochner v. New York* and *Plessy v. Ferguson*); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 998 (2003) [hereinafter *Worst Constitutional Decision*]; Paul Benjamin Linton, Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 15–16 (1993) [hereinafter *Flight from Reason*] ("[*Casey*] is virtually certain to exacerbate the political and social tensions created by *Roe* and intensify the national debate over the Court's claimed authority to impose a regime of abortion upon the American people."); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 18–19 (1992); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 976 (1992).

[265] 507 U.S. 1013, 1013–14 (1993) (O'Connor, J., concurring). *Fargo*'s "large fraction" test was disputed between the Justices in various cases until a majority rejected it in *June Medical*. *See, e.g.,* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2343 n.11 (2016) (Alito, J., dissenting) (criticizing the majority's implementation of the "large fraction" formulation); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2175–76 (2020) (Gorsuch, J., dissenting) (noting that the "large fraction" test was applied in a "circular" manner).

[266] 517 U.S. 1174, 1178–81 (1996) (Scalia, J., dissenting from denial of certiorari).

[267] 518 U.S. 137, 146 (1996) (per curiam).

[268] 523 U.S. 1036, 1036–37 (1998) (Thomas, J., dissenting from denial of certiorari).

[269] Stenberg v. Carhart, 530 U.S. 914 (2000).

[270] *See* MICHAEL J. GARCIA, ET AL., CONG. RSCH. SERV., NO. 112–9, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1937–39, 1938 n.624, 2526–27 (Centennial ed. 2016) (noting *Gonzales*'s departure from *Stenberg*); L.A. Powe, Jr., *Intergenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2099–2100, 2100 & n.48, 2126 (2014) (stating that *Gonzales* effectively overruled *Stenberg*); Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 6 (2010) (noting that *Gonzales* upheld legislation prohibiting "partial birth abortion"—the type of legislation *Stenberg* struck down).

beyond that.[271] *Whole Woman's Health* then overturned *Gonzales sub silentio*.[272] *June Medical*, with its 4-1-1-3 vote, is the latest stage in the flip-flopping of the standard of review that governs state and federal abortion regulations.[273]

The standard of review was made less strict in *Casey*, then stricter in *Stenberg*.[274] Like a cycle, the standard became again less strict in *Gonzales* until *Whole Woman's Health* made it stricter; then, implicitly, the standard was made less strict in *June Medical*—but only for *future* cases.[275] Whether *Casey* (or what part or version of *Casey*) is the standard of review is uncertain after *June Medical*. *Roe* was not settled by *Casey* or *Whole Woman's Health*.[276] Any claim that *Roe* is settled must ignore this legal, judicial, legislative, and political history.

---

[271] *See* David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RSCH. CTR. (Jan. 16, 2013), https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/#pba (noting that *Gonzalez* "emboldened" a number of states to enact stricter abortion regulations, including making abortions "beginning at 20 weeks into a pregnancy" illegal).

[272] *See* Stephen G. Gilles, *Restoring* Casey*'s Undue-Burden Standard After* Whole Woman's Heath v. Hellerstedt, 35 QUINNIPIAC L. REV. 701, 703–04, 753–54 (2017) [hereinafter *Undue Burden Standard*] (analyzing *Whole Women's Health*'s effect on the undue-burden standard as it was previously applied).

[273] 140 S. Ct. 2103 (2020).

[274] *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 964–65 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (criticizing the joint opinion's shift from "strict scrutiny" in *Roe* to an "undue burden" standard in *Casey*), *with Stenberg*, 530 U.S. at 981–83 (Thomas, J., dissenting) (noting how the majority applies a stricter version of "undue burden" than can be reconciled with *Casey*).

[275] *Compare* Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (applying a lesser version of undue burden), *with* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2323–25, 2343 n.11 (2016) (Thomas, J., dissenting) ("[T]he majority radically rewrites [*Casey*'s less demanding] undue-burden test in three ways."), *and June Medical*, 140 S. Ct. at 2132, 2182 (Kavanaugh, J., dissenting) (noting how five Justices, only one of which agreed in the judgment of the court, "reject[ed] the *Whole Woman's Health* cost-benefit standard").

[276] *See, e.g.,* CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION: ORIGINALISM, CONSTITUTIONAL INTERPRETATION, AND JUDICIAL POWER 182 (1996) ("Lincoln's list of factors that undermine the authority of Supreme Court precedents provides us with a good starting point. The more divided the Court, the less weight its opinion carries; the greater the appearance of partisanship, the less weight; the more the opinion 'surprises' or goes against the grain of educated (especially legal) expectations and the less it is supported by the practice of other branches of the government, the less weight; the more dubious the historical arguments on which it is based, the less weight; the more recent the contested decision, the less weight. Settled decisions, then, will be especially those that are agreed to by large or unanimous Court majorities, that conform to the expectations of the educated public, that are supported by the practice of government generally, and that have been reaffirmed over time." (internal citations omitted)).

B. Unsettled by Dissents and a Divided Court

Like *Dred Scott*, *Roe v. Wade* was marked by two dissents that negated acquiescence and diminished the unity and authority of that precedent, as demonstrated by critics.[277] The dissents went to the heart of *Roe* and identified fundamental constitutional and analytical problems that have persisted: the lack of precedential support, the lack of historical foundation, and the reliance on assumptions that were not part of the record for fundamental premises.[278] Justice White's dissent referred to *Roe* and *Doe* as "an exercise of raw judicial power,"[279] which became a permanent part of the national conversation over *Roe*.[280] Justice Rehnquist predicted that the decision would "accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it."[281]

Justice Rehnquist's dissent adopted a historical perspective that is more consistent than *Roe* with the Court's doctrinal methodology regarding unenumerated rights reflected in *Washington v. Glucksberg*[282] and *McDonald v. City of Chicago*.[283] An abortion "right" is not "deeply rooted in this Nation's history and tradition."[284]

[277] *See* Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting) (expressing his "fundamental disagreement" with parts of *Roe*); Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (disagreeing with the majority's unconstitutional opinion).

[278] *Roe*, 410 U.S. at 171–75, 177–78 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 221–22 (White, J., dissenting).

[279] *Doe*, 410 U.S. at 222 (White, J., dissenting).

[280] *E.g.,* Debra Cassens Weiss, *Amy Coney Barrett Signed 2006 Ad Calling for End to 'Barbaric Legacy of* Roe v. Wade*'*, A.B.A. J. (Oct. 2, 2020, 12:40 PM), https://www.abajournal.com/news/article/barrett-signed-2006-add-calling-for-end-to-barbaric-legacy-of-roe-v.-wade (discussing a pro-life advertisement "signed by more than 1,200 people" that displayed Justice White's quote calling "*Roe v. Wade* an exercise of raw judicial power").

[281] *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

[282] 521 U.S. 702, 728 (1997) (holding that the asserted right to physician-assisted suicide "is not a fundamental liberty interest protected by the Due Process Clause" because the history of the law has expressed, and continues to express, rejection of such a principle).

[283] 561 U.S. 742, 767–68 (2010) (citing *Glucksberg*, 521 U.S. at 721) (holding that self-defense is a fundamental right rooted in the legal system's history and tradition).

[284] 521 U.S. at 721; *accord Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) ("[A]bortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))); *cf. McDonald*, 561 U.S. at 792–93 (Scalia, J., concurring) (arguing that abortion rights cannot pass under the history and tradition test); *see also* DELLAPENNA, *supra* note 264, at 453 (explaining that abortion laws were enacted to protect the life of unborn children as well as the health of women); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 31 (1985) (arguing that states have a compelling interest to protect the life of the unborn

Thereafter, the Court was quickly divided over *Roe*. *Declaring* a "right" to abortion was one thing; *applying* the "right" to specific state regulations was completely different. The Court splintered after *Roe* and *Doe*, starting before *Planned Parenthood v. Danforth*, with denials of certiorari or summary dispositions that sparked dissents and could not resolve the many regulations passed by numerous states.[285] As Justice White noted in *Danforth*, "In *Roe v. Wade*, this Court recognized a right to an abortion free from state prohibition. The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process."[286]

As the decades have passed, the Justices have not been able to agree on the right to abortion. In fact, significant and thorough dissents in *Akron*, *Thornburgh*, *Webster*, and *Casey* have challenged the constitutional underpinnings of *Roe*.[287] The majority in support of *Roe* shrunk from 7-2, to 6-3, to 5-4, and has pretty much settled at 5-4 for the 35 years since *Thornburgh*. The vote in *Danforth* was 6-3, but

---

child); Linton, *Flight from Reason*, *supra* note 264, at 109–10 (arguing that *Roe* overlooked multiple jurisdictions that adopted statutes prohibiting abortion to protect unborn human life).

[285] *See* Sendak v. Arnold, 429 U.S. 968, 972 (1976) (White, J., dissenting from summary affirmance) ("Statutes passed by the legislatures of the States may not be so lightly struck down. Normal principles of constitutional adjudication apply even in cases dealing with abortion."); Greco v. Orange Mem'l Hosp. Corp., 423 U.S. 1000, 1006 (1975) (White, J., dissenting from the denial of certiorari) ("The task of policing this Court's decisions in *Roe v. Wade* and *Doe v. Bolton* is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions." (internal citations omitted)); Joseph P. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637, 637 (1976) (surveying state legislation within the first few years after *Roe* and *Doe*); *see generally* LYNN D. WARDLE, THE ABORTION PRIVACY DOCTRINE, at v (1981) (reviewing all abortion cases decided in the wake of *Roe* since January 1973).

[286] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 92 (1976) (White, J., concurring in part and dissenting in part) (internal citation omitted).

[287] *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453–54 (1983) (O'Connor, J., dissenting) (arguing that the trimester approach adopted in *Roe* is an ineffective and unworkable framework to reconcile personal rights and the states' interests); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 782–83 (1986) (Burger, C.J., dissenting) ("I regretfully conclude that some of the [constitutional] concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized."); Webster v. Reprod. Health Servs., 492 U.S. 490, 532–33 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing in favor of reconsidering *Roe* because the Court should not adopt a rule which is broader than what is required by the facts); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 995 (1992) (Scalia, J., dissenting) ("Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve."); *id.* ("But to portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian.").

5-4 on parental consent.[288] *Colautti v. Franklin* was 6-3.[289] *Bellotti v. Baird II* was 4-4-1, failing to produce a majority opinion and instead having four different opinions.[290] *Harris v. McRae* was 5-4.[291] *H. L. v. Matheson* was 5-1-3.[292] *Akron*, *Ashcroft*, and *Simopoulos* were each 6-3.[293] *Thornburgh* was 5-4.[294] *Hodgson*, too, was splintered.[295] *Casey* was 3-2-4.[296] As Chief Justice Rehnquist observed in his *Casey* dissent, "when confronted with state regulations . . . the Court has become increasingly more divided."[297]

Since *Casey*, the dissents have shifted from criticizing the constitutional foundations of *Roe*[298] to criticizing the Court's contradictory application of the standard of review and of the States' interests in fetal life and maternal health.[299] Clearly, *Roe* has not secured the acquiescence so vital to *stare decisis et quieta non movere*.

---

[288] *Danforth*, 428 U.S. at 90, 92 (Stewart, J., concurring) ("[T]he state law's requirement of parental consent [is] an absolute limitation on the minor's right to obtain an abortion.").

[289] 439 U.S. 379 (1979).

[290] 443 U.S. 622 (1979).

[291] 448 U.S. 297 (1980).

[292] 450 U.S. 398 (1981).

[293] City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

[294] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

[295] Hodgson v. Minnesota, 497 U.S. 417 (1990).

[296] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[297] *Id.* at 950 (Rehnquist, C.J., concurring in part and dissenting in part).

[298] Justice Thomas, however, continues to argue, like the dissents in *Roe* and *Casey*, that *Roe* is unconstitutional and should be overruled. *See* Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) ("Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother."); Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." (internal citation omitted)); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); Box v. Planned Parenthood of Ind. & Ky. Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring) ("Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the [lower courts] looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion."); Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring) ("This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. . . . None of these decisions is supported by the text of the Constitution."); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting) ("But those decisions created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled."); *id.* at 2152–53 ("Because we can reconcile neither *Roe* nor its progeny with the text of our Constitution, those decisions should be overruled.").

[299] *See supra* notes 274–75 and accompanying text.

Stenberg and *Gonzales* were both 5-4.[300] In *Gonzales*, Justice Ginsburg wrote in dissent, "Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. . . . It blurs the line, firmly drawn in *Casey,* between previability and postviability abortions. And, for the first time since *Roe,* the Court blesses a prohibition with no exception safeguarding a woman's health."[301] *Whole Woman's Health v. Hellerstedt* was 5-3.[302] *June Medical* was 4-1-1-3.[303] And the Georgetown Law Journal quickly published an article that denounced the decision:

> *June Medical Services L.L.C. v. Russo* has already begun gaining currency as a Trojan Horse: in form, a case that strikes down a Louisiana anti-abortion measure, but in substance, an anti-choice, pro-life ruling that effectively tees up future reversals of the Supreme Court's reproductive rights jurisprudence.[304]

So much for settling abortion law.

C. Unsettled by Legislative and Executive Lack of Acquiescence

From its earliest years, the Court looked to the acquiescence of the other departments.[305] Abraham Lincoln noted the importance of this in his initial criticism of *Dred Scott* in 1857.[306]

Roe has not received the enduring acquiescence of the Legislative or Executive departments. *Roe* has been challenged by the presidencies

---

300 *Stenberg*, 530 U.S. 914; *Gonzales*, 550 U.S. 124.

301 550 U.S. at 170–71.

302 579 U.S. 582.

303 *June Med. Servs. L.L.C.*, 140 S. Ct. at 2103.

304 Marc Spindelman, *Embracing* Casey*:* June Medical Services L.L.C. v. Russo *and the Constitutionality of Reason-Based Abortion Bans*, 109 GEO. L.J. ONLINE 115, 116 (2020).

305 *See, e.g.*, Grant v. Raymond, 31 U.S. (6 Pet.) 218, 244 (1832) ("But the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard this settled practice in a case where we are not satisfied it is contrary to law . . . .").

306 *See* Lincoln, *supra* note 89, at 389 (discussing whether all the departments of the federal government are bound by a Supreme Court decision).

of Ronald Reagan,[307] George H. W. Bush,[308] George W. Bush,[309] and Donald Trump.[310] In *June Medical Services v. Russo*, 207 members of Congress—"39 Senators and 168 Representatives, representing 38 states"—filed a brief urging the Court to "take up the issue of whether *Roe* and *Casey* should be reconsidered and, if appropriate, overruled."[311]

The Reagan Administration's Solicitor General, Rex Lee, filed a brief in July 1982 in *City of Akron v. Akron Center for Reproductive Health*, urging the Court to apply an undue burden standard rather than strict scrutiny, though not expressly urging the Court to overturn *Roe*.[312] Between 1986 and 1992, the Reagan and Bush Administrations urged the Court to overturn *Roe* in at least five cases: *Thornburgh*,[313]

---

307 *See* Julie Johnson, *Reagan Vows to Continue Battle on Abortion*, N.Y. TIMES (Jan. 14, 1989), https://www.nytimes.com/1989/01/14/us/reagan-vows-to-continue-battle-on-abortion.html ("President Reagan declared that he will never 'leave the battle' to reshape Federal policy on abortion and . . . repeated his hope that the landmark *Roe v. Wade* case would be overturned.").

308 *See* Susan Page, *Barbara Bush's Long-Hidden 'Thoughts on Abortion'*, ATLANTIC (Mar. 29, 2019), https://www.theatlantic.com/ideas/archive/2019/03/how-barbara-bush-decided-she-was-pro-choice/585589/ ("George [H. W.] Bush had tried to navigate a position down the middle. He opposed abortion but also opposed passing a constitutional amendment to ban it.").

309 *See* Julie Rovner, *Americans Are Divided on Abortion. The Supreme Court May Not Wait for Minds to Change,* NPR (Jan. 21, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/01/21/1074605184/abortion-roe-v-wade-supreme-court ("Bush was no moderate on the abortion issue. As president he signed several pieces of anti-abortion legislation . . . .").

310 Lesley Russell, *Roe v Wade v Trump*, INSIDE STORY (June 1, 2021), https://insidestory.org.au/roe-v-wade-v-trump/ ("[President Trump] also made good on his promise to load up the Supreme Court with justices who would overturn *Roe v Wade* by appointing Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett.").

311 Brief *Amici Curiae* of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 1–2, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18-1323).

312 Brief for the United States as Amicus Curiae in Support of Petitioners at 20, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (No. 81-746) ("The Court should declare that the governing standard is whether the state regulation at issue unduly burdens the abortion decision . . . .").

313 *See* Amy Goldstein & Jo Becker, *Alito Helped Craft Reagan-Era Move to Restrict* 'Roe', WASH. POST (Dec. 1, 2005), https://www.washingtonpost.com/archive/politics/2005/12/01/alito-helped-craft-reagan-era-move-to-restrict-roe/1b8e180f-47dc-4d92-a554-14b5e8c7c874/ ("As a Justice Department lawyer in the Reagan administration . . . Samuel A. Alito Jr. helped devise a legal strategy to persuade the [Supreme Court] to restrict and eventually overturn *Roe* . . . [and] argued . . . that stepping into the case, [*Thornburgh*], would be a more effective strategy for President Ronald Reagan than a 'frontal assault' on [*Roe*] . . . .").

Webster v. Reproductive Health Services,[314] *Hodgson v. Minnesota*,[315] *Rust v. Sullivan*,[316] and *Casey*.[317] The Trump Administration made clear in numerous campaign statements in 2016 that it would oppose abortion and support judges who opposed *Roe v. Wade*.[318] The Administration reaffirmed those positions between 2017 and 2020 with executive actions and judicial nominations.[319] There have been no long-settled legislative and executive practices that support *Roe v. Wade*. *Roe* is unsettled by the actual practice of Congress and the Executive Branch.[320]

D. Unsettled by State Non-Acquiescence

Analysts will argue over what polling data show about public support for *Roe*. Perhaps the more reliable data are shown by democratic action—what the states have actually done since 1973,

---

[314] Brief for the United States as Amicus Curiae Supporting Appellants, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (No. 88-605) ("*Roe v. Wade* should be reconsidered and, upon reconsideration, overruled . . . .").

[315] Brief for the United States as Amicus Curiae Supporting Respondents at 11–12, Hodgson v. Minnesota, 497 U.S. 417 (1990) (No. 88-1125) ("For the reasons discussed below and set forth more fully in our brief in [*Webster*], we continue to believe that *Roe* was wrongly decided and should be overruled.").

[316] Brief for the Respondent at 13, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391) ("We continue to believe that *Roe* was wrongly decided and should be overruled. As more fully explained in our briefs, filed as amicus curiae, in [*Hodgson, Webster, Thornburgh*, and *Akron*] the Court's conclusions in *Roe* . . . find no support in the text, structure or history of the Constitution.").

[317] Transcript of Oral Argument at 40, 43–44, 47–48, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (No. 91-744) ("[T]he key point is that a number of the Justices of this Court have said that regardless of that legal question, that constitutional question, that the State does have a compelling interest in the potential life, in fetal life, and that the interest runs throughout pregnancy.").

[318] *See, e.g.*, Ron Elving, *Which Trump Should Be Believed on Overturning* Roe v. Wade*?*, NPR (July 3, 2018, 5:00 AM), https://www.npr.org/2018/07/03/625410441/which-trump-should-be-believed-on-overturning-roe-v-wade (quoting the following statement by Trump: "If we put another two or perhaps three justices on, that will happen. And that will happen automatically, in my opinion, because I am putting pro-life justices on the court").

[319] Jamila Taylor et al., *45 Ways Trump and Congress Threaten the Promise of* Roe v. Wade, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/article/45-ways-trump-congress-threaten-promise-roe-v-wade/ (Jan. 19, 2018) (listing forty-five examples of how the Trump administration threatened *Roe*, including, among others, appointing judges who would oppose abortion, introducing anti-choice bills, limiting access to abortion care, and permitting executive actions that would undermine reproductive rights).

[320] *See* Calabresi, *supra* note 264, at 325 (comparing the unsettled abortion dispute to the National Bank dispute between 1791–1832 to show that when "political branches of government—motivated as they are by public opinion—contest a constitutional issue, it cannot be regarded as being settled as a matter of precedent").

year after year, state after state, by democratically-elected officials who are accountable to the people in regularly-scheduled elections.

The *Roe* Court anticipated state regulations of abortion in its opinion,[321] and states quickly followed in 1973 through 1975, leading up to the *Danforth* decision in 1976. But state resistance to *Roe* also has been strong since 1973 and has been demonstrated in state resolutions to overturn *Roe* and state legislation.[322] Many states have sought to regulate abortion in compliance with the limits set forth by the Supreme Court after every decision.[323] Between 1973 and 1980, "more than 150 *reported* opinions dealing with *substantive* abortion issues [were] rendered by the *federal* courts."[324] A 2021 study found that "[i]n the fifty years since the Supreme Court decided *Roe v. Wade*, more than *two-thirds* of the States have challenged the rationale and the results of the Court's opinion."[325]

The *Roe* Court misunderstood or ignored the existence and extent of state legal protection for the unborn child, as numerous scholars have documented. State legal protection *outside the context* of abortion in prenatal injury, wrongful death, and fetal homicide law has grown since *Roe*. The Court acknowledged this in *Webster*,[326] and it was also demonstrated throughout 2021, where state laws conflicted with *Roe* across 40 states.[327] Virtually every state has a prenatal injury law that protects from conception.[328] Forty states (and the District of Columbia)

---

[321] *See* Roe v. Wade, 410 U.S. 113, 162–63 (1973) ("It follows that, from and after this point [viability], a State may regulate the abortion procedure . . . .").

[322] *See, e.g.*, Paul Benjamin Linton, *Overruling* Roe v. Wade*: Lessons from the Death Penalty*, 48 PEPP. L. REV. 261, 274 (2021) [hereinafter *Overruling* Roe] (collecting statutory data to show how state legislatures "struggled with regulating abortion within limitations imposed by *Roe* and its progeny"); Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97, 99–100, 100 n.4 (1985) (citing state resolutions from twelve states "urging constitutional change to override the *Roe* decision").

[323] *See* Linton, *Overruling* Roe, *supra* note 322, at 274 (noting that state legislatures attempted to regulate abortion following limits set by *Roe* and its progeny); David M. Smolin, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, 20 CUMB. L. REV. 71, 75 (1990) (noting that after the *Webster* decision, state legislatures tried to adopt policies that protected unborn fetuses within the limitations set by *Roe* and its progeny); Witherspoon, *supra* note 285, at 637 (noting that state legislatures have taken actions to protect as many unborn fetuses as possible within the limitations set by prior abortion decisions).

[324] WARDLE, *supra* at 285, at xiii.

[325] Linton, *Overruling* Roe, *supra* note 322, at 281.

[326] Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989) (acknowledging that state law protects unborn children in other contexts, such as in tort and probate law).

[327] *See* Linton, *Overruling* Roe, *supra* note 322, at 268 (identifying in a 2021 study that forty states retained the death penalty for a variety of contexts).

[328] Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*,

have wrongful death laws, many of which reject viability.[329] Thirty-eight states have fetal homicide laws.[330] With the passage of Wyoming's fetal homicide law in 2021, 30 states now *have fetal homicide laws that protect the prenatal human being beginning at conception*.[331] In each of these areas, viability is increasingly rejected. *Roe* imposes legal schizophrenia on the States.

Since *Gonzales*, state resistance to *Roe* has grown in the number and breadth of state prohibitions of abortion. After the *Gonzales* majority's expression of concern about late-term abortions, 19 states have passed 20-week limits on abortion.[332] Two of those were struck down by the Ninth Circuit holding that *Roe*'s viability rule is "categorical."[333] Most of the rest are in effect in their states because they have *not* been challenged in court, though they risk invalidation if challenged.

In recent years, Blue states have passed laws broadly legalizing abortion throughout pregnancy, including Illinois, New York, Massachusetts, and New Jersey.[334] These are intended to "codify the

---

6 UNIV. ST. THOMAS J.L. & PUB. POL'Y 141, 146–47 [hereinafter *Unborn Child*] (2011) (examining state law, finding that 47 states protect prenatal injuries in some form and that the remaining three have never denied a cause of action for prenatal injuries).

[329] *Id.* at 148, 150.

[330] *Id.* at 143; *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, Nat'l Conf. of State Legislatures (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

[331] Brendan Lachance, *Hutchings Celebrates Passage of Wyoming 'Unborn Victims of Violence Act'*, OIL CITY NEWS (Apr. 15, 2021), https://oilcity.news/wyoming/legislature/2021/04/15/hutchings-celebrates-passage-of-wyoming-unborn-victims-of-violence-act/; Rebecca L. Simpson, *LETTER: Amend Fetal Homicide Law*, OBSERVER-REP., https://observer-reporter.com/opinion/letters/letter-amend-fetal-homicide-law/article_4a5d5e3c-61af-11ec-9ad5-e32b073534ed.html (Jan. 27, 2022); *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, NCSL (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

[332] Grace Panetta & Shayanne Gal, *The Latest Point in Pregnancy You Can Get an Abortion in All 50 States*, INSIDER, https://www.businessinsider.com/latest-point-in-pregnancy-you-can-get-abortion-in-50-states-2019-5 (May 20, 2021, 11:48 AM).

[333] Isaacson v. Horne, 884 F. Supp. 2d 961, 971 (D. Ariz. 2012) (upholding 20-week limit and granting summary judgment to the government due to documented evidence of fetal pain and increased risks to maternal health from late-term abortions), *rev'd*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014); McCormack v. Herzog, 788 F.3d 1017 (9th Cir. 2015).

[334] *See* Maureen Foertsch McKinney, *As Other States Restrict Abortion Rights, Illinois Protects and Expands*, NPR ILL. (June 12, 2019, 6:58 PM), https://www.nprillinois.org/equity-justice/2019-06-12/as-other-states-restrict-abortion-rights-illinois-protects-and-expands (addressing Illinois' comprehensive abortion law); Sam Sawyer, *Explainer: What New York's New Abortion Law Does and Doesn't Do,* AM. MAG. (Jan. 30, 2019), https://www.americamagazine.org/rha2019 ("The new law does not contain any meaningful restriction that is likely to ever prevent an abortion."); Associated Press, *Mass. Legislature Overrides Veto, Expands Access to Abortion*, ABC NEWS (Dec. 29, 2020, 4:01 PM), https://abcnews.go.com/Health/wireStory/mass-legislature-overrides-veto-

status quo" of *Roe* or even extend its scope by eliminating limits that the Court has allowed under *Roe*. In Vermont, as the *Washington Times* reported, "[t]he legislation . . . was seen by some as superfluous, given that Vermont already has no restrictions on abortion, but sponsors argued that the bill was necessary to guarantee the status quo if the Supreme Court overturns the 1973 *Roe v. Wade* decision."[335]

In contrast, Red states passed laws strongly limiting abortion, including early gestational prohibitions (called "heartbeat bills") in eleven states,[336] category-based bans, and D&E bans. A March 2019 report by the Alan Guttmacher Institute found that "304 abortion-restricting bills have been introduced in state legislatures" in 2019.[337] Additional states have enacted prohibitions on abortion that are *conditioned* upon the overruling of *Roe*.[338] When Arkansas Governor Hutchinson signed a law on March 9, 2021 that prohibited virtually all abortions, he said, "It is the intent of the legislation to set the stage for the Supreme Court overturning current case law."[339]

---

expands-access-abortion-74955508 ("The bill, known as the Roe Act, codifies abortion rights into state law, allows abortions after 24 weeks of pregnancy in cases where the child will not survive after birth, and lowers 18 to 16 the age at which women can seek an abortion without consent from a parent or guardian."); Charles Camosy, *New Jersey Democrats' Abortion Mistake*, N.Y. DAILY NEWS (Dec. 11, 2020, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-democrats-latest-abortion-mistake-20201211-sbqpedm5tngznjdgkppkcvednm-story.html ("[There are] no limits on abortion of any kind, and a requirement that private insurance companies cover birth control and abortion with no out-of-pocket costs.").

[335] Valerie Richardson, *Vermont House Passes H. 57 No-Limits Abortion Bill,* WASH. TIMES (Feb. 21, 2019), https://www.washingtontimes.com/news/2019/feb/21/vermont-house-passes-h-57-no-limits-abortion-bill/.

[336] Marisa Lloyd, *13 States Have Signed Onto Abortion Restrictions in 2021, Idaho Being One of Them,* DAILY FLY (Sept. 7, 2021), https://lcvalley.dailyfly.com/Home/ArtMID/1352/ArticleID/60593/13-States-have-Signed-Onto-Abortion-Restrictions-in-2021-Idaho-Being-One-of-Them.

[337] Linda Greenhouse, *The Flood of Court Cases That Threaten Abortion*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/opinion/abortion-supreme-court.html.

[338] *See* NEB. REV. STAT. § 28-3, 106 (2010); ALA. CODE § 26-23B-5 (2011); IDAHO CODE § 18-505 (2011); KAN. STAT. ANN. §§ 65-6724, 65-6703 (2011); OKLA. STAT. tit. 63, § 1-745.5 (2011); ARIZ. REV. STAT. ANN. § 36-2159 (2012), *invalidated by* Isaacson v. Horne, 716 F.3d 1213 (9th Cir. 2013); N.D. CENT. CODE § 14-02.1-05.3 (2013); TEX. HEALTH & SAFETY CODE ANN. § 171.044 (2013); MISS. CODE ANN. § 41-41-137 (2014); LA. STAT. ANN. § 40:1061.1 (2015); W. VA. CODE § 16-2M-4 (2015); N.C. GEN. STAT. § 14-45.1 (2016), *invalidated by* Bryant v. Woodall, 363 F. Supp. 3d 611 (M.D.N.C. 2019); WIS. STAT. § 253.107 (2016); S.C. CODE ANN. § 44-41-450 (2016); S.D. CODIFIED LAWS § 34-23A-70 (2016); OHIO REV. CODE ANN. § 2919.203 (2017); IOWA CODE § 146B.2 (2017); GA. CODE ANN. § 16-12-141 (2020), *invalidated by* SisterSong Women of Color Reprod. Justice Collective v. Kemp, 472 F. Supp. 3d 1297 (N.D. Ga. 2020); ARK. CODE ANN. § 20-16-1405 (2021); IND. CODE § 16-34-2-1 (2021), *invalidated by* Whole Woman's Health Alliance v. Rokita, 553 F. Supp. 3d 500 (S.D. Ind. 2021); KY. REV. STAT. ANN. § 311.782 (2022).

[339] Kris Maher, *Arkansas Governor Signs Bill That Bans Most Abortions*, WALL

In a sense, Blue states are going in one direction and Red states in the opposite. Both, however, are operating under the common expectation that the Court will, sooner or later, return the abortion issue to the States. Clearly, state legislatures are still challenging *Roe* 48 years after it was decided. *Roe* has "never been accepted by a large segment of the American public."[340] "[U]nlike *Brown*, resistance to *Roe* only intensified over the years. There was no accommodation by the nation to the Court's decision."[341]

E. Unsettled by Lower Court Criticism

Roe has also been unsettled by constant criticism by lower federal court judges, which the Court has traditionally relied upon in assessing the weight of precedent and the workability of a rule.[342] As Judge Higginbotham wrote in 1986: "It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism."[343] He continued: "While we are unquestionably bound to obey the Supreme Court, we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty."[344] Criticism by lower court judges has been constant and unremitting.[345]

ST. J. (Mar. 9, 2021, 5:54 PM), https://www.wsj.com/articles/arkansas-governor-signs-bill-that-bans-most-abortions-11615330493.

[340] DELLAPENNA, *supra* note 264, at 1254.

[341] *Id.* at 792.

[342] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 234 (2009) ("Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*'s 'rigid order of battle.'"); Swift & Co. v. Wickham, 382 U.S. 111, 124–25 (1965) (citing the criticism of the *Kesler* rule in the lower court by Judge Henry J. Friendly).

[343] Margaret S. v. Edwards, 794 F.2d 994, 995 (5th Cir. 1986).

[344] *Id.* at 996 n.3.

[345] *See* Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 752 (7th Cir. 2021) (Kanne, J., dissenting) ("Here we are again, faced with the seemingly endless task of determining whether a law unduly burdens a woman's ability to obtain an abortion."); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring) ("Nothing in the text or original understanding of the Constitution establishes a right to an abortion."); Planned Parenthood of Ind. & Ky. Inc. v. Box, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be . . . and whether that burden is excessive . . . . It is better to send this dispute on its way to the only institution that can give an authoritative answer."); Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 GEO. J. L. & PUB. POL. 445, 491–93 (2018) [hereinafter *A Draft Opinion*] (collecting opinions that are critical of *Roe* in Appendix A).

F. Unsettled by a Poorly Reasoned, Overly Broad Opinion and a Mistaken Understanding of History, Facts, and Science

Basic adjudicative problems led to fundamental flaws in *Roe* which have endured to keep it unsettled. The Court originally took *Roe* and *Doe* in April and May 1971 to decide "the application of *Younger v. Harris*,"[346] not to address the substance of the abortion issue. However, after the abrupt retirements of Justices Black and Harlan in September 1971, a majority of the remaining seven Justices decided to address the substantive abortion issue using *Roe* and *Doe*, two among twenty plus abortion cases in the federal courts, despite the lack of any evidentiary record on abortion in either case.[347]

With no evidentiary record, no intermediate appellate review, and no thorough consideration of constitutional questions by the lower courts, the Court in *Roe* deliberated without a basic understanding of the history, law, or the medicine of abortion.[348] The fact that *Roe* and *Doe* were argued twice did not fix the problems with the record, the briefing, the content of the four arguments, or the reasoning of the decision.[349] *Roe* was not investigated with care, as judges and scholars have emphasized.[350]

The Court's prudential doctrines to ensure that its deliberations and judgments are thorough were abandoned in *Roe*, with predictable results. The original deliberations, and the procedural shortcuts that the *Roe* Court took, help explain why *Roe* has never been settled. There was no trial or evidentiary hearing in the lower courts in *Roe* or *Doe*—no "*full-bodied record*" existed.[351] The cases were decided on motions to dismiss or for summary judgment and there was no intervening appellate review. Chief Justice Burger noted—ever so briefly—the problem of using factual assertions absent from the record in his

---

[346] Younger v. Harris, 410 U.S. 37 (1971); Forsythe, *A Draft Opinion*, *supra* note 345, at 459. *See generally* FORSYTHE, ABUSE OF DISCRETION, *supra* note 156 (discussing the story of the two years of the Supreme Court's deliberations in 1971 and 1972). On the *Younger* implications for abortion litigation in the courts in 1971, see Heather Sigworth, *Abortion Laws in the Federal Courts*, 5 IND. LEGAL F. 130 (1971).

[347] FORSYTHE, ABUSE OF DISCRETION, *supra* note 156, at 37, 41, 97.

[348] *Id.* at 97; *see also* Christopher Mills et al., *Is Viability Dicta?*, REGENT UNIV. L. REV. PRO TEMPORE, 2022, at 6 (describing the *Roe* Court's limited understanding of the issue in *Roe*).

[349] FORSYTHE, ABUSE OF DISCRETION, *supra* note 156, at 123–24.

[350] *Id.* at 153; *see also* Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1198 (1991) (reviewing Laurence Tribe's book called *Abortion: The Clash of Absolutes*) ("When the *Roe* Court stated, '[w]e need not resolve the difficult question of when life begins,' it was deciding the question without admitting it, and thus without having to support its decision with reasons.").

[351] Forsythe, *A Draft Opinion*, *supra* note 345, at 460 (emphasis added).

concurring opinion in *Doe*,[352] and later amplified in his dissent in *Thornburgh*.[353]

The rationale in *Roe* was poorly constructed for two major reasons: the precedential foundation was never demonstrated, and the historical foundation for the substantive due process right was erroneous, as Justice Rehnquist pointed out in his dissent.[354]

The majority opinion in *Roe* admitted that precedent did not support the holding in *Roe*. Justice Blackmun cited a string of cases for the *ipse dixit* that the "right of privacy" is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[355] However, six pages later, he conceded that a woman "carries an embryo and, later, a fetus" and that "[t]he situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned."[356] Thus, the *Roe* Court contradicted its precedential rationale and never explained how the rule that the *Roe* Court announced was based in precedent.[357]

The adjudicative problems led to the use of mistaken facts. The Court did not have any reliable historical rationale for its decision. *Roe's* substantive due process rationale was based on mistaken facts of legal history.[358] Additionally, the Court adopted the medical assumption that "abortion is safer than childbirth" without any evidentiary record.[359] Without those two mistaken facts, there is no *Roe v. Wade* or *Doe v. Bolton*.

Roe is "an argument from history,"[360] which purported to establish a substantive due process right.[361] It was abandoned by the time of the

---

[352] Doe v. Bolton, 410 U.S. 179, 208 (1973).

[353] Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986).

[354] Roe v. Wade, 410 U.S. 113, 173–74 (1973) (Rehnquist, J., dissenting).

[355] *Id.* at 152–53 (majority opinion).

[356] *Id.* at 159.

[357] *See* GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 650–51 (9th ed. 1975) (suggesting that the *Roe* Court failed to follow precedent without explanation).

[358] *See infra* pp. 594–95 (discussing misinterpretation of the common law treatment of abortions).

[359] *Roe*, 410 U.S. at 149; David C. Reardon & Priscilla K. Coleman, *Short and Long Term Mortality Rates Associated with First Pregnancy Outcome: Population Register Based Study for Denmark 1980-2004*, 18 MED. SCI. MONITOR 71, 75 (2012).

[360] DELLAPENNA, *supra* note 264, at 689.

[361] *See, e.g.*, Norman Vieira, Roe *and* Doe*: Substantive Due Process and the Right to Abortion*, 25 HASTINGS L.J. 867, 868 n.6 (1974) ("In rapid order the Court brushed aside serious problems of federalism, mootness, and standing."); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV.

Court's decision in *Webster v. Reproductive Health Services*[362] and has never been reaffirmed or replaced on the merits.[363] Justice Blackmun devoted nearly half of the Court's opinion to the "history of abortion law," relying on Cyril Means.[364] He did this, ostensibly, to prove several novel legal propositions: that abortion was a common practice before the 19th century; that abortion was not a common law crime,[365] that a right to abortion existed in Anglo-American common law prior to the 19th century, that it was not until after the Civil War "that legislation began generally to replace the common law," and that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are [in 1973]."[366]

Each of these historical premises has been refuted. Numerous common law cases before the first English abortion statute of 1803[367] show the criminality of abortion.[368] The Court misunderstood and ignored the legal history that showed the law's solicitous protection for the developing human being in the context of evolving medical understanding.[369]

Justice Blackmun also incorrectly stated that the abortion laws of the states were enacted in the 19th century only to protect women from physical danger and not to protect the unborn child.[370] Justice

---

159, 180 (1973) (describing the Court's mentality in creating the substantive due process right).

[362] 492 U.S. 490, 520 (1989). Only two other Justices joined the part of Chief Justice Rehnquist's opinion where he stated that they thought abortion was "a liberty interest protected by the Due Process Clause." *Id.*

[363] Amici Curiae Christian Legal Society and Robertson Center for Constitutional Law in Support of Petitioners at 13–14, Dobbs v. Jackson Women's Health Org., (No. 19-1392) (U.S. filed July 28, 2021).

[364] DELLAPENNA, *supra* note 264, at 684.

[365] *Roe*, 410 U.S. at 136.

[366] *Id.* at 139, 158.

[367] *Lord Ellenborough's Act of 1803*, STATUTES PROJECT, https://statutes.org.uk/site/the-statutes/nineteenth-century/43-geo-3-c-58-lord-ellenboroughs-act-1803/ (last visited Feb. 11, 2022).

[368] DELLAPENNA, *supra* note 264, at 126–27. Among many other English cases before the 1803 English statute, Dellapenna examines the 1281 English case of *Rex v. Code* as confirming the criminality of abortion. *Id.* at 138–39; *see also* John Keown*, Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3 (2006) (describing how the common law prohibition on abortions after quickening gave way in the 19th century to the discovery that life begins at fertilization).

[369] *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 335–38 (4th ed. 1971) (describing how the law changed over time to find that a child comes into existence at the moment of conception); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 573–74 (1987) [hereinafter *Homicide of the Unborn*] (describing the legal protections at common law); DELLAPENNA, *supra* note 264, at 126 (discussing the unfounded legal presumptions of the *Roe* opinion).

[370] *Roe*, 410 U.S. at 149, 151; *see also* John Finnis, *Abortion Is Unconstitutional*,

Blackmun used this inaccurate history to claim that a right to abortion was implicit in the broad liberty clause of the 14th Amendment ratified in 1868.

Along the way, the Court misunderstood and misconstrued the legal and practical significance of the common law quickening[371] and born alive rules.[372] Both of these were evidentiary rules, necessary to prove the *corpus delicti*. Infanticide was the method of choice, not abortion, as no reliable or effective abortion method existed before the middle of the 19th century.[373]

The historical rationale of *Roe* has been subject to severe and sustained criticism, starting with Justice Rehnquist's *Roe* dissent. Numerous critical reviews were published between 1973 and *Webster*.[374] *Webster* abandoned the history rationale, *Casey* never mentioned it,[375] and it was refuted by Joseph Dellapenna in his 2006 encyclopedic treatment, *Dispelling the Myths of Abortion History*.[376]

This is significant because *Roe*'s failed history—which underestimated historical protection for prenatal human beings—taken together with the more comprehensive legal protection afforded to the prenatal human being today under state prenatal injury,

FIRST THINGS (Apr. 2021), https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional ("By the end of 1849, eighteen of the thirty states had antiabortion statutes; by the end of 1864, twenty-seven of the thirty-six; and by the end of 1868, thirty of the thirty-seven states—including twenty-five of the thirty ratifying states, along with six territories.").

371 DELLAPENNA, *supra* note 264, at 132–33, 139–40, 191 ("In 1601, no certain means of proving that a woman even was pregnant existed until the infant had 'quickened' . . . ."); FORSYTHE, ABUSE OF DISCRETION, *supra* note 156, at 31.

372 DELLAPENNA, *supra* note 264, at 126; FORSYTHE, ABUSE OF DISCRETION, *supra* note 156, at 31.

373 DELLAPENNA, *supra* note 264, at 89.

374 *See, e.g.*, JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982, at 11 (1988) (explaining that common law abortion convictions were low only because they were hard to detect and prosecute); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1267–69 (1975) (rebutting the faulty historical assumptions in *Roe*).

375 Stephen G. Gilles, *Why the Right to Elective Abortion Fails* Casey*'s Own Interest-Balancing Methodology—and Why It Matters*, 91 NOTRE DAME L. REV. 691, 692 (2016) [hereinafter *Right to Elective Abortion*] ("[T]he *Casey* Court made no attempt to defend *Roe*'s much-criticized history of abortion in Anglo-American law . . . .").

376 DELLAPENNA, *supra* note 264, at 694 ("[T]he claim of a freedom to abort fails if the history fails—and the history does fail."). Dellapenna's exhaustive review of abortion techniques before the 20th century shows that they were so dangerous as to make abortion (aimed at terminating a pregnancy) rare and to make infanticide (waiting to kill the infant after birth) the preferred option. *Id.* at 89. Dellapenna concludes that "Anglo-American law has always treated abortion as a serious crime, generally even including early in pregnancy," and presents evidence of prosecutions going back eight centuries in English history. The reasons for these prosecutions and penalties consistently focused on protecting the life of the unborn child. *Id.* at xii.

wrongful death, and fetal homicide law,[377] show that the "the balance which our Nation . . . has struck between" the woman's supposed right to abortion and the child's right to life is *not* "the balance" assumed by the *Casey* Court.[378]

When it has defended *Roe*, the Court's defense has been weak and has avoided the merits and the rationale for the right to abortion.[379] The Court abandoned the substantive due process rationale based in history in *Webster* 16 years later. And it has never identified a rationale actually based in the Constitution.[380] Courts after *Roe* have never been able to "stand behind the solid shield of a firm, clear principle enunciated in earlier cases."[381]

Therefore, Senator Arlen Specter's famous claim that *Roe* had been "reaffirmed" more than 30 times is a gross distortion of what the Court has done in fact.[382] The reality is that *Roe* has been *applied* in cases more than thirty times but never *reaffirmed* on the merits. The Court has reaffirmed *Roe* merely on a brief, narrow, and rigid application of stare decisis without examining the merits of the constitutional rationale or substituting a new one for *Roe*'s abandoned rationale.[383] Second, the result in *Roe*—a right to abortion—has been

---

[377] Linton, *Unborn Child*, *supra* note 328, at 146–48; Forsythe, *Homicide of the Unborn*, *supra* note 369, at 602.

[378] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1993) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

[379] JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 222 (2001) (describing the defenses of *Roe* as "merely reemphasiz[ing] the embarrassing sense of artifice, of post-hoc rationalization, that has accompanied the right of privacy since the Supreme Court first discerned it in the 'penumbras' and 'emanations' of the Bill of Rights"); Gilles, *Right to Elective Abortion*, *supra* note 375, at 695 (writing that in *Casey*, Justices Kennedy, O'Connor and Souter "declined to explain how each of them would have ruled on ['the interest-balancing judgment on which the right to elective abortion now rests'] had it come before them as an original matter").

[380] *See* Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. ILL. L. REV. 1985, 1990 ("Marriage mattered in *Griswold*, but it was irrational to consider it in *Eisenstadt*; national consensus provided the justification for exercise of judicial power in *Griswold*, but in *Roe* the Court overturned the law of almost every state; precedent was sacrosanct in *Casey* but dispensable in *Lawrence*. The only consistency in reasoning is that the Justices always decide cases the way they want them to come out. Substantive due process doctrine provides no guidance and has no content beyond the feelings and beliefs of the Justices who make up a majority at any given time.").

[381] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989).

[382] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 539 (2005) (statement of Karen Pearl, Interim President, Planned Parenthood Federation of America).

[383] *See* Charles J. Cooper et al., Roe *and* Casey *Were Grievously Wrong and Should Be Overruled*, 17 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2, 9 (2021) (stating that no Justice, while on the bench, has supported the merits of *Roe*'s reasoning, and that *Casey* did not defend *Roe*'s merits but reaffirmed it on factors of stare decisis).

applied in cases, but the legal standard of review has not been consistently applied from case to case.

The factual and sociological assertions in the majority opinion were *assumptions*, as the Court later admitted in *Akron*[384] and *Casey*.[385] The *Casey* plurality failed to acknowledge the absence of any evidentiary record in *Roe* and *Doe* and simply asserted—another *ipse dixit*—that no facts related to *Roe*'s "central holding" had changed.[386] Judge Henry Friendly was an early, severe critic of *Roe*'s adoption of the sociological premise that abortion was safer than childbirth—an assumption based on social science data that was not part of the record.[387] This was the central medical assumption at the foundation of the super-structure of *Roe*, including the trimester system, the viability rule, the deference to abortion providers compared to the States, the identification and value of the States' interests in fetal life and maternal health, and the unlimited "health" exception at all points of pregnancy.[388]

Roe's health exception is simply incoherent whereas the Court itself has been unable to frankly acknowledge its scope.[389] The Court in *Roe* and *Doe* held that the states could *not* prohibit abortion after fetal viability if the woman's "health" was involved, defining "health"

---

[384] City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 430 n.12 (1983) ("Of course, the State retains an interest in ensuring the validity of *Roe*'s factual assumption that 'the first trimester abortion [is] as safe for the woman as normal childbirth at term,' an assumption that 'holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman.'"(alteration in original) (quoting Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam))).

[385] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) ("We have seen how time has overtaken some of *Roe*'s factual assumptions . . . .").

[386] *Id.* at 864.

[387] Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 36–38 (1978) ("[T]he main lesson I wish to draw from the abortion cases relates to procedure—the use of social data offered . . . for the first time in the Supreme Court itself. . . . The Court's conclusion in *Roe* that '[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth' rested entirely on materials not of record in the trial court, and that conclusion constituted the underpinning for the holding that the asserted interest of the state 'in protecting the woman from an inherently hazardous procedure' during the first trimester did not exist." (second alteration in original)); *see also* A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1035, 1046–47 (2006) (detailing the 1972 draft opinion by Judge Henry Friendly that could have changed *Roe* and comparing its philosophical basis with the Court's decision in *Roe*).

[388] *See* Friendly, *supra* note 387, at 35–38 (detailing Judge Friendly's criticism of the Supreme Court's severe abortion restrictions which were founded on the premise that abortion was safer, and support was from materials not subjected to the trial process).

[389] Stephen G. Gilles, Roe*'s Life-Or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 527 (2009).

to mean "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[390] In addition, the Court said that the states must give abortion providers discretion and "room" to decide whether a woman's "health" was at stake for abortions after fetal viability.[391] Of course, there was no evidentiary record on any of this in *Roe* or *Doe*.

The *Casey* plurality could not frankly admit the scope of the health exception. Instead, the plurality wrote: the "Constitution protects a woman's right to terminate her pregnancy in its early stages."[392] Justices Breyer and O'Connor, in their separate writings, could not admit the scope of the abortion right, describing it as limited to the "early months of pregnancy,"[393] or in the "first three months of pregnancy."[394] But in practice, limits on late-term abortions are, in fact, struck down.[395]

The false medical assumptions have been challenged by time; experience; and social, medical, and technological developments. The Court has said that it "is not bound by its prior assumptions."[396] The key medical assumption of *Roe*—that abortion is safer than childbirth—has been constantly criticized. A 2004 medical journal article by Bartlett shows that the assumption is untenable with abortion after twenty weeks.[397] Since *Roe*, the Court has issued more

---

[390] Doe v. Bolton, 410 U.S. 179, 191–92. Scholars recognize the breadth of the health exception after viability. WARDLE, *supra* note 285, at xi (writing that *Roe* and *Doe* "effectively invalidated (totally or in part) existing abortion restrictions in all 50 states"); Paulsen, *supra* note 264, at 995–96 n.4 ("Under the *Roe*/*Doe* framework, the right . . . may be limited by the state, 'except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother.' . . . 'Health,' however, is a legal term of art in the abortion context." (internal citations omitted)).

[391] *Doe*, 410 U.S. at 192.

[392] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

[393] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 68 (2010).

[394] SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 45 (2003).

[395] Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187, 190 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1347, 1348 (1998) (Thomas, J. (joined by Chief Justice Rehnquist and Justice Scalia), dissenting from denial of certiorari to review Ohio's limit on post-viability abortions); Isaacson v. Horne, 716 F.3d 1213, 1231 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

[396] Lopez v. Monterey Cnty., 525 U.S. 266, 281 (1999).

[397] Linda Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 729 (2004) (stating that the risk of death in abortion procedures increases with each additional week of gestation); *see also* Helen M. Alvaré, *Nearly 50 Years Post-*Roe v. Wade *and Nearing Its End: What* Is *the Evidence That Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 185, 187–90 (2022) (noting that severe disparity in reporting requirements and lack of medical studies prevent accurately comparing the safety of abortion and childbirth).

than thirty decisions without reliable data on maternal mortality from abortion, the safety of abortion, and complications from abortion.[398]

Social and technological developments, a stare decisis factor emphasized in *South Dakota v. Wayfair*,[399] have undermined *Roe*. Ultrasound came on the commercial medical market in the United States a few years after *Roe* and permanently changed public understanding about prenatal development.[400] In the decades since *Roe*, artificial birth control (contraception) has expanded in methods and availability, improved in efficacy, and has decreased in cost.[401] The abortion rate has declined by more than 53% since 1980.[402]

G. Unsettled by the Court's Unworkable Role as "the Nation's Ex Officio Medical Board"

If Chief Justice Roberts is concerned with a "decision" that "risks a major expansion of the judicial role,"[403] *Roe v. Wade* is the all-time standard by which to measure such expansions. The Court in *Roe* and *Doe* took control of the abortion issue in every state, over every abortion clinic, and assumed the power to review every abortion regulation.[404]

---

[398] Burk Schaible, *Improving the Accuracy of Maternal Mortality and Pregnancy Related Death*, 29 ISSUES L. & MED. 231, 231–33 (2014). The authors calculated the number of abortion decisions issued by the Court.

[399] *Cf.* 138 S. Ct. 2080, 2094 (2018) (describing how advanced technology has allowed remote businesses to locate in more business-friendly states, undermining local businesses).

[400] Janet A. DiPietro et al., *Studies in Fetal Behavior: Revisited, Renewed, and Reimagined*, 80 MONOGRAPHS SOC'Y FOR RSCH. CHILD DEV. 1, 11–12 (2015) (describing how around the 1970s ultrasounds allowed the viewing and monitoring of a fetus); *see also* Brief for the Am. Coll. of Pediatricians & the Assoc. of Am. Physicians & Surgeons as Amici Curiae in Support of Petitioners, at 3, 10–25, Dobbs v. Jackson Women's Health Org., (No. 19-1392) (U.S. filed July 29, 2021) (describing the modern scientific understanding and providing picture comparisons of ultrasound imaging today and in 1973).

[401] Gilles, *Right to Elective Abortion*, *supra* note 375, at 735 (citing "improvements in the efficacy and safety of some contraceptive methods since *Roe*"). The Court may perhaps, in the future, take judicial notice of the fact that birth control can be ordered online and delivered to homes.

[402] *See* Rachel K. Jones, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPS. ON SEXUAL AND REPROD. HEALTH 41, 43 (2011) (noting the downturn in abortions). According to the Guttmacher Institute, the abortion rate peaked at 29.3 per thousand women of childbearing age in 1980 and fell to 13.5 per thousand women of childbearing age in 2017: (29.3 - 13.5)/29.3 = .539 (or a decline of over 53 percent). *Abortion Incidence in the United States, 2017*, GUTTMACHER INST., https://www.guttmacher.org/infographic/2019/abortion-incidence-united-states-2017 (May 11, 2022).

[403] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 807 (2021) (Roberts, C.J., dissenting) ("Today's decision risks a major expansion of the judicial role.").

[404] *See* WARDLE, *supra* note 285, at xiii–xiv (referencing the hundreds of cases

As Justice Ginsburg recognized, shortly after the *Casey* decision in 1992, *Roe* "fashion[ed] a regime blanketing the subject, a set of rules that displaced virtually every state law then in force."[405] Even New York's limit on abortion at twenty-four weeks was claimed to be unconstitutional because of the broad "health" exception after viability announced in *Roe* and *Doe*, which the Court said were to be "read together."[406] Certainly, New York's prohibition could not be enforced if a woman's physician, at his sole discretion, could say that her "health" might be affected by pregnancy after viability.

The Court is handicapped—along with every lower federal court—in its oversight of every abortion clinic and clinic regulation by the limits of litigation and the adversarial process, and by its professional incapacity to deal with the statistical and medical details. As Judge Ryan observed after thirty years of abortion litigation, "we suffer from a serious institutional disability in a case in which vitally important issues turn on medical facts, yet the record consists mainly of the conflicting opinions of highly interested, even ideologically motivated, experts."[407]

Though the Court took legal control of abortion law and practice for 49 years, it has largely forsaken the role and cannot fill that role competently.[408] In effect, the Court has exercised that self-appointed

---

decided between *Roe* and 1980 that attempted to resolve substantive questions); Linton, *Overruling* Roe, *supra* note 322, at 264 ("[T]he Court decided *Roe v. Wade*, effectively striking down the abortion statutes of all fifty states.").

[405] Ginsburg, *supra* note 262, at 1199.

[406] Roe v. Wade, 410 U.S. 113, 165 (1973) ("That opinion [*Doe v. Bolton*] and this one, of course, are to be read together.").

[407] *See* Women's Med. Pro. Corp. v. Taft, 353 F.3d 436, 449 (6th Cir. 2003) (showing the limitations that the court faced when making a decision on abortion regulation); *accord* Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) ("[M]atters of such medical complexity and moral tension as partial birth abortion should not be resolved by the courts, with no semblance of sanction from the Constitution they purport to interpret."); Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006) (Walker, C.J., concurring) ("I can think of no other field of law that has been subject to such sweeping constitutionalization as the field of abortion."); McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) ("[I]f courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's 'choice' is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew."). *See generally* Richard S. Myers, *Lower Court 'Dissent' from* Roe *and* Casey, 18 AVE MARIA L. REV. 1 (2020).

[408] Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48, 108 (2020); Dahlia Lithwick, *Foreword:* Roe v. Wade *at Forty*, 74 OHIO ST. L.J. 5, 12 (2013) ("The paradox of *Roe*, then, forty years later, is that it represents a conversation about a Supreme Court whose time has passed, a doctrine that has been overtaken by science and medicine, a legal architecture that is a mere ghost of itself, and a symbol of the role of courts in an era that has seen the courts construct a vastly different role.").

role by delegating to abortion providers tremendous discretion over virtually all aspects of abortion practice. Providers can trust the courts to invalidate state regulations with a minimal role for state and local public officials, which is constantly supervised by the Supreme Court and lower federal courts.

This has had significant public health implications for 49 years, but the impact is insulated from public view by the delegation of all aspects of abortion practice, including record-keeping and reporting, to abortion providers. There is no reliable national system of abortion data collection, analysis, and reporting in the U.S.[409] The ability of the States to collect public health data about abortion was still uncertain at the time of *Casey* nearly 20 years after the *Roe* decision.[410] That vacuum has yet to be filled.[411]

The Justices have recognized, from time to time, the substandard conditions and standards by which providers in abortion clinics practice,[412] but the Court has demonstrated that it is largely oblivious in part because there is no federal agency that maintains thorough and comprehensive oversight.[413] The Court cannot exercise its self-appointed role with any confidence in national data on safety, injuries, complications, or deaths.

The Court defers, for example, to the Food & Drug Administration (FDA) on federal regulations for the administration of mifepristone, but the FDA cannot monitor adverse events after usage and does not regulate to maintain safety.[414] It cannot supervise abortion clinics or

---

[409] *See* Schaible, *supra* note 398, at 232–34 (discussing the limitations within the CDC's system of collecting data on abortion-related mortality).

[410] Planned Parenthood of Se. Pa. v. Casey, 502 U.S. 1056, 1056–57 (1992) ("Certiorari granted limited to the following questions: 1. Did the Court of Appeals err in upholding the constitutionality of [the] reporting requirements [provisions]?"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 900 (plurality opinion) (discussing and upholding the constitutionality of Pennsylvania's abortion reporting requirements).

[411] See Steven H. Aden, *How America's Abortion Industry Became a Woman's Worst Nightmare*, *in* UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN 15, 34–36 (Steven H. Aden ed., 2021), for a 50-state investigative report of substandard conditions and providers across the country, available at https://aul.org/unsafe. This third edition of *Unsafe* relies on FOIA reports from many states. Ams. United for Life, *How* Unsafe *Is Abortion in Your State*, *in* UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN, *supra*, at 56.

[412] City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S 416, 448 n.39 (1983) (commenting that doctors who recommend abortions are responsible for giving competent medical advice).

[413] *See* Catherine Glenn Foster, *A Common Sense Appeal to Aggregate Abortion Data and Report Outcomes*, *in* UNSAFE: AMERICA'S ABORTION INDUSTRY ENDANGERS WOMEN, *supra* note 411, at 10 (stating that several states choose not to submit their abortion data to the CDC, causing a lack of complete understanding of the issue).

[414] *See* FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10, 12 (2020) (Alito, J., dissenting) (stating that a Maryland Judge disregarded the Chief Justice's

abortion practices in any meaningful way or monitor injuries and complications.[415] It has delegated enforcement to the abortion industry. It has allowed abortion providers and clinics to largely self-regulate because the Court does not have the capacity to evaluate the medical assumption of *Roe* that "abortion [is] as safe for the woman as normal childbirth" nor monitor and evaluate medical studies and the state of the medical literature.[416]

H. Unsettled by a Constantly Shifting Standard of Review and Conflicting Precedents

The Supreme Court has repeatedly said that a central purpose of stare decisis is reliability, consistency, and stability.[417] The Justices have long recognized that a decision may be unsettled by subsequent decisions that are inconsistent.[418] Yet, the standard of review for abortion regulations has constantly changed through numerous abortion decisions over 48 years. In *Akron*, Justice O'Connor pointed out that the Court between *Roe* and *Akron* did not consistently apply a

---

warning not to second-guess health officials such as the FDA); Kathi Aultman et al., *Deaths and Severe Adverse Events After the Use of Mifepristone as an Abortifacient from September 2000 to February 2019*, 36 ISSUES L. & MED. 3, 25 (2021) (stating the FDA cannot "determine the post-marketing safety of mifepristone due to its inability to adequately assess the frequency or severity of adverse events."). *See generally* Clarke Forsythe & Donna Harrison, *State Regulation of Chemical Abortion After* Dobbs, 16 LIBERTY U. L. REV. (forthcoming 2022).

[415] *See* Aultman et al., *supra* note 414, at 25 (stating the FDA cannot adequately assess adverse effects of abortion due to the lack of a mandatory reporting requirement).

[416] *Akron*, 462 U.S. at 430 n.12 (quoting Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam)); *accord* Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES, https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html (Dec. 16, 2021) (discussing the FDA reducing regulation of abortion pills); Alice Miranda Ollstein, *FDA Loosens Rules for Distributing Abortion Pills, Opening New Battle Fronts*, POLITICO, https://www.politico.com/news/2021/12/16/fda-abortion-pill-loosen-rules-525164 (Dec. 16, 2021, 6:11 PM) (discussing the FDA's removal of longstanding rules that regulated abortion pills).

[417] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

[418] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 666 (1961) (Black, J., concurring) ("[T]he continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a [standard for determining when illegally seized evidence could not be admitted in state prosecutions] left the situation at least as uncertain as it had been before."). The opposite is true as well. *See* Heath v. Wallace, 138 U.S. 573, 585 (1891) ("[S]ettled by an unbroken line of decisions . . . ."); Wallace v. M'Connell, 38 U.S. (1 Pet.) 136, 150 (1839) ("[A] uniform course of decisions . . . .").

fundamental rights analysis but applied a shifting standard of review.[419]

The confused, shifting standard of review started with *Roe*. The Court did not actually hold in *Roe* that abortion was a 'fundamental' constitutional right, but merely obliquely observed: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[420] This ambiguity is compounded in the Court's conclusion in Section XI of the *Roe* opinion. That summary nowhere mentions abortion as a fundamental right, strict scrutiny, or the need to "narrowly tailor" regulations.[421] Instead, the Court only required that regulations be "reasonably related" to the state interest and be "tailored to the recognized state interests."[422] In *Doe*, the Court applied a "legitimately related" test and an "unduly restrictive" standard.[423] *Nowhere in Roe or Doe does the Court hold that abortion is a fundamental right*.

In the decisions between *Roe* and *Webster*, the Court did not consistently treat abortion as a "fundamental right" nor consistently apply strict scrutiny. In *Akron*, Justice Powell stated, "the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy."[424] He cited nine abortion decisions.[425] This overstatement is contradicted by an examination of those opinions and Justice Powell's own observations in *Carey v. Population Services International*, that "neither of those cases [*Planned Parenthood v. Danforth* or *Doe v. Bolton*] refers to the 'compelling state interest' test" and that the Court in *Doe v. Bolton* used the "reasonably related" test.[426] His citations confirm that virtually none *held* abortion to be a "fundamental right." After his retirement, Justice Powell referred to *Roe* and *Doe* as "the worst opinions I ever joined."[427]

---

[419] *Akron*, 462 U.S. at 466 (O'Connor, J., dissenting) ("I find no justification for the trimester approach used by the Court to analyze this restriction. I would apply the 'unduly burdensome' test and find that the hospitalization requirement does not impose an undue burden on that decision.").

[420] Roe v. Wade, 410 U.S. 113, 155 (1973).

[421] *Id.* at 164–66.

[422] *Id.* at 164–65.

[423] Doe v. Bolton, 410 U.S. 179, 194–95, 198 (1973).

[424] *Akron*, 462 U.S. at 420 n.1.

[425] *Id.*

[426] 431 U.S. 678, 704 (1977) (Powell, J., concurring).

[427] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 341 (2001).

Instead, the Supreme Court abortion decisions between *Roe* and *Casey* often involved reining in overbroad lower federal court decisions that had struck down regulations the Supreme Court declared should be upheld. In one summary affirmance, *Sendak v. Arnold*, the Court did not rein in the lower federal court nor require the courts to consistently apply any standard of review.[428] In the 6-3 decision, the Court summarily affirmed a three-judge district court decision from Indiana, which struck down basic safety regulations.[429] The Blackmun majority would not tolerate such basic safety regulations that were generally applicable to other ambulatory surgery.

In 1989, the Court issued a "non-decision" in *Webster v. Reproductive Health Services*.[430] A plurality disavowed strict scrutiny, but a majority did not yet adopt the undue burden standard. Justice Scalia pointed out that *Roe* was unsettled.[431] The decision was criticized as leaving "uncertain just what standard should be applied to test the constitutionality of abortion statutes. Uncertainty served to increase the already shrill abortion debate in electoral politics to an even higher pitch."[432]

In *Casey*, the Court officially threw out strict scrutiny and adopted the "undue burden" standard that Justice O'Connor said the Court had been applying between *Roe* and *Akron*.[433] But *Casey* did not settle the matter. The confusion in the standard of review after *Casey* has been well-documented.[434] As Professor Neal Devins frankly admitted, "*Casey* is a sufficiently malleable standard that it can be applied to

---

[428] 429 U.S. 968, 968 (1976); *see also*, Arnold v. Sendak, 416 F. Supp. 22, 24 (S.D. Ind. 1976) (holding that the State can only regulate where an abortion takes place after the compelling point).

[429] *Arnold*, 429 U.S. at 968; *Arnold*, 416 F. Supp. at 24. On the Court's elimination of health and safety regulations after *Roe* and its public health impact, see generally Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 46 (2012).

[430] *See generally* Christopher A. Crain, Note, *Judicial Restraint and the Non-Decision in* Webster v. Reprod. Health Servs., 13 HARV. J.L. & PUB. POL'Y 263, 263, 265 (1990) (exploring the impact of *Webster* in keeping *Roe* unsettled).

[431] Webster v. Reprod. Health Servs., 492 U.S. 490, 535 (1989) (Scalia, J., concurring) (writing that the Court does not "avoid[] throwing settled law into confusion" but instead "preserves a chaos that is evident to anyone who can read and count").

[432] DELLAPENNA, *supra* note 264, at 846; *see also* James Bopp, Jr. & Richard E. Coleson, *What Does* Webster *Mean?*, 138 U. Pa. L. Rev. 157, 177 (1989) (explaining the political landscape of the abortion debate after *Webster*).

[433] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871–74 (1992).

[434] *See, e.g.*, David J. Garrow, *Significant Risks:* Gonzales v. Carhart *and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 46 ("*Casey* and its much-mocked undue burden test . . . ."); Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825, 843–45, 846, 847, 848–52, 854–56, 857–62, 863–69 (1996) (collecting federal court decisions).

either uphold or invalidate nearly any law that a state is likely to pass."[435]

Months later, in *Fargo Women's Health Organization v. Schafer*, Justices O'Connor and Souter announced that they were going to apply a "large fraction" test to all abortion regulations.[436] That test bounced around, with some decisions ignoring it, between *Casey* in 1993 and *Whole Woman's Health v. Hellerstedt* in 2016.[437]

Consistency in the standard of review is important for settled law. As the Court said in *Hohn v. United States*, "Once we have decided to reconsider a particular rule . . . we would be remiss if we did not consider the consistency with which it has been applied in practice."[438]

Leading up to *Whole Woman's Health*, federal circuit courts were split over whether balancing was part of the undue burden analysis.[439] The Court's opinion in *Whole Woman's Health* changed the standard of review—as Chief Justice Roberts acknowledged in *June Medical*—and thereby kept Roe unsettled. *Whole Woman's Health* adopted a balancing analysis that was not based on *Casey*.[440] A majority of the Court in *June Medical* explicitly rejected the balancing analysis of *Whole Woman's Health* for the future and Chief Justice Roberts changed the standard of review in abortion cases once again, which

---

[435] Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1322 (2009). Time and experience with abortion decisions, abortion politics, state legislative action, and elections since 2009 have served to refute Devins's assessment that *Casey* settled abortion law. That refutation has been evidenced by the Court's flip-flopping on the standard of review for state abortion legislation in *Whole Woman's Health* and *June Medical*. *See* Laura Wolk & O. Carter Snead, *Irreconcilable Differences?* Whole Woman's Health, Gonzales*, and Justice Kennedy's Vision of American Abortion Jurisprudence*, 41 HARV. J.L. & PUB. POL'Y 719, 720 (2018) ("[T]he Court's alternative approaches have wide-ranging practical ramifications as well because they send radically different signals to state legislatures regarding the field of legitimate interests and the appropriate role of the courts in assessing legislation.").

[436] 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring).

[437] *See, e.g.*, David D. Meyer, Gonzales v. Carhart *and the Hazards of Muddled Scrutiny,* 17 J.L. & POL'Y 57, 62–71 (2008) ("[C]lose observation revealed that the Court's review often strayed from this formal description. By the late 1980s, for example, it was clear that the Court had relaxed its scrutiny of abortion regulations. Rather than rigidly insisting upon 'compelling interests' and 'narrow tailoring,' the Court essentially passed upon the 'reasonableness' of individual regulations from case to case."); Kevin Martin, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COLUM. L. REV. 173, 208 (1999) (stating that circuit courts are split over *Casey*'s "large fraction test").

[438] 524 U.S. 236, 252–53 (1998) (citations omitted).

[439] Gilles, *Right to Elective Abortion*, *supra* note 375, at 700 n.42 (collecting cases).

[440] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 633–36 (2016) (Thomas, J., dissenting); *see also* Gilles, *Undue Burden Standard*, *supra* note 272, at 703 (noting that the Court applied a standard different from *Casey*'s undue-burden standard).

was recognized by Justice Kavanaugh in his dissent.[441] Immediately after *June Medical*, parties and judges in numerous cases in the lower federal courts re-argued the standard of review in abortion cases.[442]

I. Unsettled by a Viability Rule Without Constitutional Justification

It is a familiar problem of jurisprudence to define a judge-made rule and its scope and to determine, in future cases, what falls within and without.[443] Judge-made rules have been given less respect by the Court when it comes to stare decisis.[444] The viability rule of *Roe v. Wade* is a unique example. This judge-made rule was dictum in *Roe* and in its restatement in *Casey*, since neither the statutes in *Roe* nor those in *Casey* were predicated on viability.[445] Ironically, the viability rule has rarely been *applied* in Supreme Court abortion decisions since 1973, and yet it is considered by some federal courts to be "categorical."[446]

As Yale Law School Professor John Hart Ely emphasized: "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking

---

[441] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

[442] Planned Parenthood of Ind. & Ky. v. Box, 991 F.3d 740, 752–53 (7th Cir. 2021) (Kanne, J., dissenting) ("The Supreme Court . . . vacated the panel's decision and remanded it 'for further consideration in light of' *June Medical* . . . , a fractured case that produced six different opinions." (internal citations omitted)); Whole Woman's Health v. Paxton, 978 F.3d 896, 914 (5th Cir. 2020) (Willett, J., dissenting) ("The controlling opinion of *June Medical Services LLC v. Russo* scrapped the benefits vs. burdens balancing test used by the district court (and endorsed by the panel majority). Even under *Whole Woman's Health v. Hellerstedt*'s amorphous and now-defunct balancing test, SB8 passes constitutional muster."); Hopkins v. Jegley, 968 F.3d 912, 915–16 (8th Cir. 2020) ("[W]e vacate the district court's preliminary injunction and remand for reconsideration in light of Chief Justice Roberts's separate opinion in *June Medical*, which is controlling . . . .").

[443] GARNER ET AL., *supra* note 64, at 88–91.

[444] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 233–34 (2009) (stating that "revisiting precedent is particularly appropriate where, as here, . . . the precedent consists of a judge-made rule"); Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer, J., concurring) ("Given that *Saucier* is a *judge-made* procedural rule, *stare decisis* concerns . . . are weak." (emphasis added)); Bunting v. Mellen, 541 U.S. 1019, 1019 (2004) (Stevens, J., concurring in denial of certiorari) (wanting to revisit "an unwise judge-made rule"); United States v. Gaudin, 515 U.S. 506, 521 (1995) (explaining that stare decisis is at its weakest in procedural matters); Will Baude, *Stare Decisis and Judge-Made Law*, VOLOKH CONSPIRACY (June 21, 2018, 7:48 PM), https://reason.com/volokh/2018/06/21/stare-decisis-and-judge-made-law/ (arguing that judge-made rules, which are wrongly decided, are entitled to less deference).

[445] Beck, *Transtemporal Separation*, *supra* note 53, at 1412–13.

[446] *E.g.*, Little Rock Fam. Planning Servs. v. Rutledge, 984 F.3d 682, 687–88 (8th Cir. 2021).

respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."[447] Furthermore, he contended that *Roe* is a "very bad decision" because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[448] As Ely observed, "[E]ven after viability the mother's life *or health*"—which is "defined very broadly . . . to include what many might regard as the mother's convenience"—"must, as a matter of constitutional law, take precedence over . . . the fetus's life."[449] Ely noted that "the Court does not see fit to defend this aspect of its decision at all."[450]

The viability rule suffers from several defects. It was arbitrary. It considered only the size and survivability of the fetus but not the implications for maternal health. It has been isolated by developments in prenatal injury, fetal homicide, and wrongful death law. It has been superseded by medical developments. And for all these reasons, it has been consistently criticized since 1973.[451]

During deliberations in 1971 and 1972 leading up to its decision, the *Roe* Court debated the scope of the abortion "right" it was creating. Early drafts of the opinion referred to a right during the first twelve weeks of pregnancy.[452] That lasted through the second round of arguments in October 1972, after which Justice Blackmun worked on a new draft and the Justices discussed the scope of the right.[453]

Eventually, the third draft opinion in December 1972 included a rule that the woman has a right to an abortion up to fetal viability, as the *Casey* Court later described it. The plurality in *Casey* called the viability rule the "essence" of *Roe*.[454] However, the viability rule cannot be derived from legal history and had no role in the common law.[455]

---

[447] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1973).

[448] *Id.* at 947.

[449] *Id.* at 921 n.19.

[450] *Id.*

[451] *See, e.g.*, Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 505–09 (2011) [hereinafter *Self-Conscious Dicta*] (overviewing the history and criticisms of *Roe*'s trimester framework); Randy Beck, Gonzales*,* Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249, 249–52 (2009) [hereinafter *Viability Rule*] (criticizing the trimester framework for the fact that some call it arbitrary and its negative treatment since its use in *Roe*).

[452] *See* Beck, *Self-Conscious Dicta*, *supra* note 451, at 520 (explaining *Roe*'s opinion drafting process).

[453] *Id.* at 520–24.

[454] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992).

[455] It crept into U.S. law for the first time in a state tort decision authored by Oliver Wendell Holmes Jr.'s in *Dietrich v. Northampton*, 138 Mass. 14, 15–16 (1884), while a member of the Massachusetts Supreme Judicial Court. Although *Dietrich* was

Casey claimed *Roe* had a "reasoned statement" about viability.[456] However, this is factually untrue as viability was neither briefed nor argued in *Roe* and *Doe*.[457] Viability played no role in the Texas or Georgia laws at issue in the cases.[458] The two oral arguments in *Roe* and *Doe* in December 1971 and October 1972 never mentioned viability—not even once.[459] No party or amicus asked the Court to adopt a viability rule or draw the line at viability.[460]

The viability rule was "self-conscious dictum" in *Roe* and *Doe*.[461] In 1989, University of Chicago law professor Geoffrey Stone, who clerked for Justice Brennan at the time of *Roe*, acknowledged in an interview, "Everyone in the Supreme Court, all the justices, all the law clerks knew it was 'legislative' or 'arbitrary.'"[462]

Dictum is not binding, and the decision does not deserve stare decisis respect. Since the viability rule in *Roe* was dictum, what was the holding of *Roe*? Holdings contain only what was necessary (pivotal)

---

later overturned, Holmes's misinterpretation of the common law served to mislead the Court in *Roe*. For the legal, historical, and analytical errors in Holmes' opinion in *Dietrich*, see Clarke D. Forsythe, *The Legacy of Oliver Wendell Holmes,* 69 U. DETROIT MERCY L. REV. 677, 685–89 (1992) (reviewing LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991) and SHELDON M. NOVAK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989)).

[456] *Casey*, 505 U.S. at 870.

[457] Beck, *Self-Conscious Dicta*, *supra* note 451, at 507, 511–12, 520–21 (describing the history of *Roe* and *Doe* and how dicta has influenced abortion jurisprudence frameworks); Beck, *Viability Rule*, *supra* note 451, at 267–69 (explaining the logical fallacy included in the viability rule); Randy Beck, *The Essential Holding of* Casey*: Rethinking Viability*, 75 UMKC L. REV. 713, 722–25 (2007) [hereinafter *Rethinking Viability*] (detailing the Court's explanations of the viability rule); Ely, *supra* note 447, at 924 ("[T]he Court's defense [of viability] seems to mistake a definition for a syllogism.").

[458] *See* Roe v. Wade, 410 U.S. 113, 117–19 (1973) (describing the Texas abortion statute at issue in the case); Doe v. Bolton, 410 U.S. 179, 182–84 (1973) (describing the Georgia statute at issue in the case).

[459] The transcripts from each case contain no references to viability. *See* Transcript of Oral Argument, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18); Transcript of Oral Argument, Doe. v. Bolton, 410 U.S. 179 (1973) (No. 70-40).

[460] *See, e.g.*, Brief for Appellee at 128–31, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) (arguing that unborn children have constitutional rights, protecting them from abortion); Brief for Wade, as Amici Curiae Supporting Appellee, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) 1972 WL 136208 (arguing that relief in *Roe* would amount to an advisory opinion and that the lower court should not have exercised jurisdiction in the first place).

[461] Beck, *Self-Conscious Dicta*, *supra* note 451, at 520–21; *see also* Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMM. 75, 84 n.32 (1991) (describing viability as "incoherent").

[462] Bob Woodward, *The Abortion Papers*, WASH. POST (Jan. 22, 1989), https://www.washingtonpost.com/archive/opinions/1989/01/22/the-abortion-papers/ce695bcc-a7f9-4b09-bd57-8d7efff37a46/.

for decision.[463] Viability was not relevant, let alone necessary, to the invalidation of the Texas and Georgia laws in *Roe*. Ever since *Roe*, the viability rule has received substantial judicial criticism, and scholarly criticism, starting with John Hart Ely.[464]

There has not been a subsequent abortion decision in which a majority of the Court issued a holding based on the application of the viability rule (as applied) to the concrete situation of any woman. Only one decision in 49 years has hinged on viability, *Colautti v. Franklin*.[465] In *Colautti*, the Pennsylvania definition of viability was found to be unconstitutionally vague, but the Court did not apply any concrete application of the viability rule as applied to any woman's life or health.[466]

As Justice White pointed out in his powerful dissent in *Colautti*, it was the Court in *Roe* who introduced ambiguity into the viability rule by defining the term "viability" to signify the stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[467] So, for 49 years, the dictum in *Roe* has been merely a reiteration by the Court of the abstract right. The "essence" of *Roe* has been repeated as an abstract statement of the scope of the right.

The Court had the opportunity to revisit and refashion the viability rule in *Casey*. But the viability rule in *Casey* was also

---

[463] Carroll v. Carroll's Lessee, 57 U.S. (16 How.) 275, 286–87 (1853) (Curtis, J., writing for the Court) ("If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs."); Black, *supra* note 11, at 750 ("The maxim *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the court or judge outside of the record, or on points not necessarily involved therein. Such expressions, being *obiter dicta*, do not become precedents.").

[464] Ely, *supra* note 447, at 928–30 (arguing that *Roe* is less defensible than *Griswold*). Ely's article was identified by Gerald Gunther as "particularly powerful criticism, more elaborate than those in the dissenting opinions in *Roe*." GERALD GUNTHER, CONSTITUTIONAL LAW 650 (9th ed. 1975); Beck, *Transtemporal Separation*, *supra* note 53, at 1462 (discussing Ely's thorough analysis of *Roe*); Nancy D. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 664 (1986) (similar); Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4–5 (1973) (quoting Ely, *supra* note 447, at 924); Paul Benjamin Linton & Maura K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 CASE W. RSRV. L. REV. 283, 291 n.35 (2019) (similar).

[465] 439 U.S. 379, 388 (1979).

[466] *Id.* at 390–97.

[467] *Id.* at 401 (White, J., dissenting).

dictum.[468] As with the Texas law in *Roe* and the Georgia law in *Doe*, the five Pennsylvania statutes reviewed in *Casey* did not hinge on viability.[469] *Casey* did not supply a justification for the viability rule but merely recited what the Court had said in *Roe*.[470] The plurality in *Casey* defended the viability rule with an aside: there is no more workable line, providing another *ipse dixit* left unexplained.[471]

Since *Roe*, viability has increasingly become isolated to abortion law. Viability has been rejected in tort and criminal law affecting prenatal rights such as prenatal injury law and fetal homicide law.[472] Viability has decreased as a gestational line in wrongful death law.[473] The year after *Casey*, the Pennsylvania Supreme Court noted "no jurisdiction accepts the . . . assertion that a child must be viable at the time of birth in order to maintain an action in wrongful death."[474]

Further weakening the viability rule was the blurring of the rule in *Gonzales v. Carhart*, as Justice Ginsburg observed, because the Court allowed the federal Partial-Birth Abortion Ban Act, in a facial challenge, to apply before and after viability.[475]

Another problem that has developed over the years is the medical safety of the viability rule. In constructing the viability rule in *Roe*, the Court considered the impact on the fetus, but never considered the impact on maternal health.[476] There is now strong evidence that maternal health is threatened by the viability rule's allowance of late-term abortions because the mortality rate from late-term abortions increases significantly after twenty weeks of pregnancy.[477]

Since *Gonzales*, the viability rule has also been challenged by the 20-week limits enacted in twenty-three states since 2010. Most are in effect and not being challenged. Though the federal courts have

---

[468] Beck, *Viability Rule*, *supra* note 451, at 250 n.9 ("[N]one of the issues in *Casey* turned on the stage of fetal development since the regulations in question applied throughout pregnancy. Consequently, the plurality's retention of the viability rule can be viewed as dicta.").

[469] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (describing the Pennsylvania provisions).

[470] *E.g.*, Randy Beck, *Twenty-Week Abortion Statutes: Four Arguments*, 43 HASTINGS CONST. L.Q. 187, 190–91, 198 (2016).

[471] *Casey*, 505 U.S. at 870 ("And there is no other line other than viability which is more workable.").

[472] Linton, *Unborn Child*, *supra* note 328, at 143–48.

[473] *See* Hamilton v. Scott, 97 So. 3d 728, 746 (Ala. 2012) (Parker, J., concurring) (criticizing the viability rule of *Roe* and contrasting it with decreasing reliance on viability in other areas of American law on prenatal rights).

[474] Hudak v. Georgy, 634 A.2d 600, 602 (Pa. 1993).

[475] 550 U.S. 124, 187–88 (2007) (Ginsburg, J., dissenting).

[476] Roe v. Wade, 410 U.S. 113, 160–62 (1973) (discussing the viability line without reference to woman's health).

[477] Bartlett et al., *supra* note 397, at 729.

dogmatically applied the viability rule,[478] its legal and intellectual fabric is in shreds in 2021. And, in *Dobbs v. Jackson Women's Health Organization*, the Court has agreed to address "whether all pre-viability prohibitions on elective abortions are unconstitutional."[479]

J. Unsettled by Doctrinal Developments

Roe's failure to root the abortion right in the text, history, or structure of the Constitution created a crisis in constitutional law that forced the reworking of constitutional doctrine.

First, the right to privacy on which *Roe* was based died on the vine. The privacy rationale was dropped by *Webster* in 1989 and officially dropped in *Casey* in 1992. The Court in recent years has been hesitant to identify a general constitutional right of privacy.[480]

Second, the substantive due process analysis in *Roe* was based on a false history. It did not root the right in the Constitution. The substantive due process analysis in *Roe* does not meet the analysis the Court adopted in *Washington v. Glucksberg* and in *City of Chicago v. McDonald*.[481]

Other doctrinal developments have left *Roe* unsettled. Even 40 years of third-party standing jurisprudence has not settled that doctrine in abortion law.[482] In less controversial areas than abortion, some precedents are readily admitted to being notoriously unsettled.

---

[478] *E.g.*, Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013) (invalidating Arizona's abortion law because it violated Supreme Court precedent).

[479] Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. argued Dec. 1, 2021).

[480] NASA v. Nelson, 562 U.S. 134, 159 (2011) ("[W]e conclude that the Government's inquiries do not violate a constitutional right to informational privacy."); *id.* at 169 (Thomas, J., concurring) ("I agree with Justice Scalia that the Constitution does not protect a right to informational privacy."); *see also* Maryland v. King, 569 U.S. 435, 465–66 (2013) (holding that DNA identification of arrestees is reasonable in the detainment process).

[481] *See* Paulsen, *Abrogating Stare Decisis*, *supra* note 119, 1557–58 (explaining how the *Glucksberg* test considers whether a fundamental right is deeply rooted in America's history and tradition and that *Roe* fails that test); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 671 & n.47 (1997) (explaining the *Glucksberg* test and how acceptance has become a key factor for determining fundamental rights, which *Roe* fails); *cf.* McDonald v. City of Chicago, 561 U.S. 742, 767–69 (2010) (explaining substantive due process and the incorporation of the Second Amendment).

[482] *See, e.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2146 (2020) (Thomas, J., dissenting) ("Contrary to the plurality's assertion otherwise . . . abortionists' standing to assert the putative rights of their clients has not been settled by our precedents." (internal citations omitted)); *see also* Brandon L. Winchel, *The Double Standard for Third-Party Standing:* June Medical *and the Continuation of Disparate Standing Doctrine*, 96 NOTRE DAME L. REV. 421, 434–38 (2020) (explaining the problems in third-party standing in abortion cases).

Hill v. Colorado is unsettled due to a closely divided, 6-3 decision, with dissents by Justices Scalia and Kennedy. It has been questioned by lower court judges like Judge Sykes in *Price v. City of Chicago*.[483] And it has been the subject of scholarly criticism.

K. Unsettled by Scholarly Criticism, Politicians, the Media, and the Public

Predictions and expectations that *Roe* would be overturned sooner or later have been relatively constant for 35 years, at least since the *Thornburgh* decision in 1986, when the Court's support for *Roe* dropped to 5-4.[484] The predictions and expectations have only increased since the 2016 election.[485]

Roe's sweeping scope led to unanticipated consequences. The Court's nationwide legalization of abortion, striking down the laws of all fifty states, immediately provoked conscientious objections from individuals and institutions, prompting federal and state conscience

---

[483] 915 F.3d 1107, 1109 (7th Cir. 2019).

[484] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

[485] *See, e.g.*, Mary Ziegler, *Pro-choice Movement's Big Win at Supreme Court Might Really Have Been a Loss*, CONVERSATION (July 16, 2020, 2:45 PM), https://theconversation.com/pro-choice-movements-big-win-at-supreme-court-might-really-have-been-a-loss-142530 ("The fate of Roe is more uncertain than ever. In my view, the threats to abortion have hardly diminished, and John Roberts, the deciding vote in *June Medical*, may well be one to carry that out."); Katie Dangerfield, 'Roe v. Wade *is Doomed': Expert Says Abortion Will Soon Be Illegal in Many U.S. States*, GLOBAL NEWS (July 3, 2018, 11:28 AM), https://globalnews.ca/news/4309206/*Roe*-v-wade-abortion-u-s-supreme-court-justice/ ("Because they know that there are now going to be five votes on the Supreme Court to overturn *Roe v. Wade*. And abortion will be illegal in a significant part of the United States in 18 months. There is just no doubt about that . . . . *Roe v. Wade* is doomed, it is gone because Donald Trump won the election."); *Planned Parenthood President on Supreme Court Abortion Ruling*, NPR (June 29, 2020, 12:04 PM), https://www.npr.org/2020/06/29/884634262/planned-parenthood-president-on-supreme-court-abortion-ruling ("And we still have 16 cases that are one step away from the Supreme Court that could still determine access to abortion."); Press Release, Congressional Pro-choice Leaders Sound Alarm over Supreme Court's Decision to Hear Louisiana Abortion Law (Oct. 4, 2019) (on file with Congressional Pro-choice Caucus) ("There is no bigger threat to Americans' right to have an abortion than the current make up of this Supreme Court. We cannot continue to rely on the highest court in our land to protect our rights under *Roe v. Wade*."), https://houseprochoicecaucus-degette.house.gov/media-center/press-releases/congressional-pro-choice-leaders-sound-alarm-over-supreme-court-s; Bruce Ledewitz, *Why Precedent Alone May Not Be Enough to Save* Roe v. Wade, PA. CAPITAL-STAR (May 5, 2020, 6:30 AM), https://www.penncapital-star.com/commentary/why-precedent-alone-may-not-be-enough-to-save-*Roe*-v-wade-bruce-ledewitz/ (speculating that Justice Kavanaugh could be another vote to overturn *Roe v. Wade*); Kevin J. Jones, 'Roe*' Abortion Decision Could Still Be Overturned at SCOTUS, Law Professor Says*, CATHOLIC NEWS AGENCY (July 7, 2020, 4:00 PM), https://www.catholicnewsagency.com/news/Roe-abortion-decision-could-still-be-overturned-at-scotus-law-professor-says-20292 (explaining law professor O. Carter Snead's prediction that *Roe* could be overturned by the Supreme Court).

legislation protecting institutions and individuals. The conflict of conscience has continued without pause, prompting new federal and state legislation to address the problem.[486] There is a real problem with coerced abortion, and at least 16 states require providers to inform women that they cannot be coerced into getting an abortion.[487] Eleven states have passed prohibitions on sex-selection abortion.[488]

Roe was immediately hit by scholarly criticism that has been enduring.[489] This included the leading constitutional scholars of that era—Ely, Bickel, Cox, Tribe, Epstein, Wellington, and Kurland. John Hart Ely's 1973 response to *Roe* was devastating and has been influential and widely cited ever since.[490]

Numerous other scholarly critiques were published immediately after *Roe*. Within a few years, scholars started the process of "rewriting *Roe*,"[491] and it has continued non-stop.[492] The scholarly criticism has continued year after year, and after each Supreme Court decision on abortion.[493] As one scholar has claimed, there is no "serious scholar,

---

[486] *See, e.g.*, San Francisco v. Azar, 411 F. Supp. 3d 1001, 1005–08 (N.D. Cal. 2019) (discussing the history of doctors and conscientious objections to abortions on their behalf).

[487] *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion# (Jan. 1, 2022).

[488] *Abortions Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly.

[489] For a collection of the early criticism, see WARDLE, *supra* note 285, at xii, xii nn.7–14; Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 ST. LOUIS U. PUB. L. REV. 229, 230 n.8 (1987) (disputing the historical reasoning in Justice Blackmun's opinion and collecting sources); Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 313–16 & nn.62–73 (2006) (collecting additional critical authorities).

[490] *See, e.g.*, Mark Osler, Roe*'s Ragged Remnant: Viability*, 24 STAN. L. & POL'Y REV. 215, 233 (2013) ("Among the first critics of the viability time marker, famously, was Yale professor John Hart Ely . . . ."); Sarah Primrose, *An Unlikely Feminist Icon?: Justice Harry A. Blackmun's Continuing Influence on Reproductive Rights Jurisprudence*, 19 CARDOZO J.L. & GENDER 393, 416 (2013) ("[O]ne of the decision's earliest and fiercest critics [was] John Hart Ely").

[491] Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1569 (1979); *accord* Nancy Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade*,* 95 YALE L.J. 639, 643 (1986).

[492] *See generally* JACK M. BALKIN, Roe v. Wade*: An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION, *supra* note 9, at 3, 18 (showing ten different legal scholars opinions for how *Roe* should have been decided differently).

[493] *See* Dennis J. Horan & Thomas J. Balch, Roe v. Wade*: No Justification in History, Law, or Logic*, *in* ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 57, 57–58 (Dennis J. Horan et al. eds., 1987) ("It is difficult to find a contemporary decision whose reasoning is more universally questioned by the

judge, or lawyer who attempts to defend *Roe*'s analysis on textual or historical grounds."[494]

A decade after *Roe*, Professor Mark Tushnet summarized the consensus of opinion of legal academics about the Court's opinion in *Roe v. Wade*: "It seems to be generally agreed that, as a matter of simple craft, Justice Blackmun's opinion for the Court was dreadful."[495]

At the time of *Gonzales* and *Whole Woman's Health*, *Roe* was acknowledged, even by pro-abortion-rights academics, to be unsettled.[496] Harvard Law Professor Richard Fallon stated: "[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."[497] Likewise Professor Michael Gerhardt asserted that *Roe* cannot be considered a "super precedent," in part, because calls for its demise by national political leaders have never retreated.[498] In 2020, University of Chicago Law Professor Geoffrey Stone endorsed Professor Mary Ziegler's book, stating the book was relevant "in a world in which *Roe* may soon be overturned . . . ."[499] In September 2020, the Atlantic published an article entitled "Is this really the end of abortion?"[500] The author feared that "abortion rights" could be decimated because one Justice had died.[501] If *Roe* was settled, change in the Court's composition would not provoke such fear.

At the National Constitution Center in Philadelphia in October 2019, attorney Kathryn Kolbert, who argued *Casey*, and Professor

---

community of legal scholars."); CLARKE D. FORSYTHE, AMERICANS UNITED FOR LIFE, A SURVEY OF JUDICIAL AND SCHOLARLY CRITICISM OF *ROE V. WADE* SINCE 1973: LEGAL CRITICISM AND UNSETTLED PRECEDENT 3–4 (2022).

[494] Paulsen, *Worst Constitutional Decision*, *supra* note 264, at 1007.

[495] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretativism and Neutral Principles*, 96 HARV. L. REV. 781, 820 (1983); *accord* Arnold H. Loewy, *Why* Roe v. Wade *Should Be Overruled,* 67 N.C. L. REV. 939, 939 (1989) (arguing that *Roe* was "fundamental[ly]" wrong).

[496] *See* Pamela S. Karlan, *The Law of Small Numbers:* Gonzales v. Carhart*,* Parents Involved in Community Schools*, and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1372 (2008); Spindelman, *supra* note 304, at 115 (2020) (acknowledging that *June Medical* "may well prove to imperil" *Casey*). In June 2010, former Clinton Administration Acting Solicitor General Walter Dellinger, in speaking at a forum cosponsored by Politico, predicted that *Roe* would be overturned. James Hohmann, *Predicting an End to* Roe v. Wade, POLITICO (June 23, 2010, 12:07 AM), https://www.politico.com/story/2010/06/predicting-an-end-to-Roe-v-wade-038899.

[497] Fallon, *supra* note 241, at 1116.

[498] Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1220 (2006).

[499] MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT (2020).

[500] Emma Green, *Is This Really the End of Abortion?*, ATLANTIC (Sep. 22, 2020), https://www.theatlantic.com/politics/archive/2020/09/abortion-supreme-court-vacancy/616430/.

[501] *Id.*

Mary Ziegler both predicted, that the Supreme Court will overturn *Roe v. Wade*.[502] The moderator of the first presidential debate in September 2020, Susan Page of USA Today, posed a question that assumed *Roe* would be overturned.[503] In March 2021, Robin Marty, another abortion activist, republished an updated *Handbook* discussing how to actively prepare for the overturning of *Roe v. Wade*.[504]

The confirmation hearings of Justice Barrett during the week of October 12, 2020, were permeated with concerns about *Roe* being overturned. The obvious truth that *Roe* is still unsettled was highlighted when, in response to a question by Senator Klobuchar as to whether *Roe* was "super-precedent," Justice Barrett forthrightly replied: "I'm answering a lot of questions about *Roe*, which I think indicates that *Roe* doesn't fall in that category."[505]

Years before *June Medical*, there were increasing claims that *Roe* was shaky and threatened.[506] With *June Medical* and the confirmation of Justice Barrett, the Court overturning *Roe*—sooner or later—has become *the expectation*, reflected in state legislative action and widespread public commentary.

Legislators are still challenging *Roe*, 49 years after it was decided, through abortion-restricting bills.[507] In Vermont, as the *Washington Times* reported, "[t]he [*Roe* abortion right] legislation, which now goes to the Democrat-controlled Senate, was seen by some as superfluous, given that Vermont already has no restrictions on abortion, but sponsors argued that the bill was necessary to guarantee the status quo if the Supreme Court overturns the 1973 *Roe v. Wade* decision."[508]

Instead of expectations that *Roe* will remain the law, expectations are that *Roe* will be overturned. States, political activists, and

---

[502] *See* Roe v. Wade *Debate at National Constitution Center*, at 10:30, C-SPAN (2019), https://www.c-span.org/video/?464051-1%2Froe-v-wade-debate-national-constitution-center (Kathryn Kolbert says "I will fully predict, unlike my adversary here, this Court is prepared to overrule *Roe* and return the matter to the states and permit recriminalization of abortion"); *id.* at 13:50 (Mary Ziegler says "The Court will probably in form or in name overturn *Roe*").

[503] Susan Page, *Vice Presidential Debate: Full Transcript of Mike Pence and Kamala Harris*, USA TODAY, https://www.usatoday.com/story/news/politics/elections/2020/10/08/vice-presidential-debate-full-transcript-mike-pence-and-kamala-harris/5920773002/ (Oct. 8, 2020, 11:37 AM).

[504] ROBIN MARTY, NEW HANDBOOK FOR A POST-*ROE* AMERICA: THE COMPLETE GUIDE TO ABORTION LEGALITY, ACCESS, AND PRACTICAL SUPPORT (2d ed. 2021).

[505] *Barrett Confirmation Hearing: Day 2 Part 2*, at 1:32:17 C-SPAN (Oct. 13, 2020), https://www.c-span.org/video/?476316-4/barrett-confirmation-hearing-day-2-part-2.

[506] *See, e.g.*, Gilles, *Right to Elective Abortion*, *supra* note 375, at 694 ("[T]he composition of the Court could shift sufficiently that a majority of the Justices would be willing to consider overturning the right to elective abortion.").

[507] Greenhouse, *supra* note 337.

[508] Richardson, *supra* note 335.

organizations are acting, and urging women to act, in reliance on *the expectation that Roe will be overturned*.

L. Unsettled by the Unsuccessful Search for a Constitutional Rationale

The Court has noted that changing the rationale of a decision is a sign that the precedent is unsettled and should be reexamined.[509] The original, historical rationale for *Roe* was so thoroughly criticized that it was abandoned by *Webster v. Reproductive Health Services*.[510] A majority of Justices has never replaced the original constitutional rationale of *Roe*, let alone replaced it with one that shows that the "right[]" is "deeply rooted in this Nation's history and tradition."[511]

Since *Roe*, there has been a continuing search for a new rationale to support *Roe*.[512] Michael McConnell referred to this phenomenon as "the holy grail of modern constitutional theorizing."[513] Richard Posner called *Roe* "the Wandering Jew of constitutional law."[514]

> It started life in the Due Process Clause, but that made it a substantive due process case and invited a rain of arrows.

[509] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2481 n.25 (2018) ("[T]he fact that '[t]he rationale of [*Abood*] does not withstand careful analysis' *is* a reason to overrule it . . . ." (alterations in original) (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003))); Citizens United v. FEC, 558 U.S. 310, 363 (2010) ("When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.); *id.* at 379 (Roberts, C.J., concurring) ("[W]hen the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."); Montejo v. Louisiana, 556 U.S. 778, 792 (2009) ("We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies."); *Lawrence*, 539 U.S. at 577 ("The rationale of *Bowers* does not withstand careful analysis.").

[510] 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J.); *see also* DELLAPENNA, *supra* note 264, at xii (writing that Justice Blackmun "silently abandoned his reliance on history" argument that was used in *Roe v. Wade*). At the time of *Webster*, Bob Woodward referred to *Webster* as "a Missouri case that tests *Roe* once more." Bob Woodward, *supra* note 462.

[511] Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

[512] BALKIN, *supra* note 244, at x; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade*,* 63 N.C. L. REV. 375, 375, 385 (1985) (arguing that the right to abortion should have been based on gender equality and the Equal Protection Clause); Gonzales v. Carhart, 550 U.S. 124, 171–72 (2007) (Ginsburg, J., dissenting) (same); Regan, *supra* note 491, 1569 (1979).

[513] Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE. L.J. 1501, 1539 (1989).

[514] Richard Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441–42 (1992).

> Laurence Tribe first moved it to the Establishment Clause of the First Amendment, then recanted. Dworkin now picks up the torch but moves the case into the Free Exercise Clause, where he finds a right to autonomy over essentially religious decisions. Feminists have tried to squeeze *Roe v. Wade* into the Equal Protection Clause. Others have tried to move it inside the Ninth Amendment . . . still others (including Tribe) inside the Thirteenth Amendment. I await the day when someone shovels it into the Takings Clause, or the Republican Form of Government Clause . . . or the Privileges and Immunities Clause. It is not, as Dworkin suggests, a matter of the more the merrier; it is a desperate search for an adequate textual home, and it has failed.[515]

That search is evidence of *Roe*'s unsettled status.

As of 2020, the majority in *June Medical Services v. Russo*, could not agree on the nature of the abortion right. As Justice Alito wrote in dissent, joined by Justices Thomas, Gorsuch, and Kavanaugh, "The divided majority cannot agree on what the abortion right requires."[516]

No alternative rationale for the *Roe* decision has been identified and agreed upon by a majority of the Justices. No informed person would say that Justice Ginsburg's equal protection rationale for *Roe* in her *Gonzales* dissent will be accepted by the Court. And no informed person would say that women are "discrete and insular minorities" that do not receive adequate consideration in the political process.[517] No Justices have given any credence to alternative rationales that have been proffered by academics. Nearly 50 years after it was decided, *Roe* is adrift without a constitutional anchor that might justify imposing it on the States and the public.

M. Planned Parenthood v. Casey *Did Not Settle* Roe

The plurality in *Casey* never directly addressed whether *Roe* was unsettled or why and what implications that might have for stare decisis. But it conceded that *Roe* was unsettled with the opening sentence of its opinion: "Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a

[515] *Id.* (internal citations omitted); *see also id.* at 442–43 (giving an overlook analysis as to why *Roe* cannot fit into the Equal Protection Clause).

[516] 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting).

[517] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *accord* Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority"*, 16 GA. L. REV. 407, 419–21 (1982) (explaining the background of "discrete and insular minority" and how it changes equal protection analysis).

woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned."[518]

On the eve of *Casey* in 1992, it was widely anticipated that the Court would overturn *Roe* in *Casey*, as it had been predicted in *Webster* and in each of the abortion cases between *Webster* and *Casey*. "*Roe* had been teetering in the years immediately preceding *Casey*."[519] *Casey* was "so dramatic, somewhat unexpected, and marked the end (at least for the time being) of what had been a serious and increasingly effective political and legal campaign to overrule *Roe*."[520] The plurality in *Casey* ignored widespread expectations that *Roe* was on the verge of being overruled and failed to address whether any reliance interests or expectations were *reasonable*.

While *Casey*'s 3-2-4 vote did not overrule *Roe*, it also did not settle it.[521] Justice Blackmun's separate opinion confirmed his fear that *Roe* was not settled, that *Casey* had not settled *Roe*, and that "a single vote" could overrule it.[522] Settlement was directly raised, however, by Justice Scalia in dissent, when he asked, "Has *Roe* succeeded in producing a settled body of law?"[523] This was left unanswered. As Justice Ginsburg recognized, *Casey* was a "splintered decision."[524] It could not—and it did not—settle the law.

Casey rests almost exclusively on stare decisis and, in particular, the reliance-interest rationale of stare decisis. The Court did not affirm *Roe* on the merits but, with a heavy emphasis on stare decisis, simply said that *Roe* could not be overturned.[525] However, there was no plenary briefing in *Casey* on stare decisis or a constitutional rationale for an abortion "right." In fact, upon initially granting certiorari and months before oral argument, the Court had intentionally rejected the question presented by Pennsylvania on the reversal of *Roe* and

---

[518] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (internal citation omitted).

[519] Paulsen, *Worst Constitutional Decision*, *supra* note 264, at 997.

[520] *Id.* at 998.

[521] Beck, *Rethinking Viability*, *supra* note 457, at 713 (arguing that, as demonstrated by *Stenberg*, the abortion decision after *Casey*, "the three Justices who formed the *Casey* plurality had not successfully resolved the abortion issue even among themselves").

[522] *Casey*, 505 U.S. at 943 (Blackmun, J., concurring in part and dissenting in part).

[523] *Id.* at 999 (Scalia, J., concurring in part and dissenting in part).

[524] Ginsburg, *supra* note 262, at 1199.

[525] Gilles, *Right to Elective Abortion*, *supra* note 375, at 692 ("[T]he *Casey* Court did not affirm that interest-balancing judgment on the merits."); *id.* (noting that it was "applied—but not affirmed on the merits—in *Casey*"); *id.* at 691 ("[A] five-Justice majority, relying heavily on stare decisis, reaffirmed the Supreme Court's earlier holding in *Roe v. Wade* that a woman has a constitutional right to an elective abortion prior to fetal viability."); Linton, *Flight from Reason*, *supra* note 264, at 15–17.

accepted the questions presented only on the constitutionality of the specific statutes at issue.[526]

The plurality relied on "institutional integrity, and the rule of *stare decisis*."[527] As Justice Scalia noted, "The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of 'reasoned judgment'; merely that it must be followed, because of *stare decisis*."[528]

The "wrongly decided" factor of stare decisis was dismissed with a sentence: "[T]he immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding."[529] The plurality looked at changed facts but dismissed them.[530] It also dismissed the unworkable factor.[531] Bypassing all of these, it settled on the "reliance interest" factor and rested its case for preserving *Roe* on this sole factor—stare decisis, not the merits.[532] *Casey* did not provide what *Roe* lacked. As Stephen Gilles has argued, "having declared that they could not reaffirm *Roe* without relying on stare decisis, they proceeded to argue that stare decisis should be given extraordinary weight in *Roe*'s case."[533] *Casey* is also unsettled in its stare decisis analysis, which has been rarely cited in subsequent Supreme Court decisions on stare decisis since 1992. And *Casey*'s stare decisis analysis has been the subject of judicial criticism as well as significant scholarly criticism.[534]

The plurality opinion said why *Roe* should not be overturned. It did not state a constitutional rationale for *Roe* or a "right" to abortion.[535] The plurality called "the contending sides of a national

---

[526] Planned Parenthood of Se. Pa. v. Casey, 502 U.S. 1056, 1056–57 (1992) ("Certiorari granted limited to the following questions: '1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act . . . .'"); *see also* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 428 (1998) ("The order granting certiorari was expressly limited to whether the court of appeals erred in upholding or invalidating specific provisions of the Pennsylvania Abortion Control Act. The state wanted the Court to address the question whether *Roe* should be overruled, but Justice Souter convinced his colleagues to rephrase the questions solely in terms of the specific provisions of the statute reviewed below. Only four—the bare minimum—voted to hear the case: White, Stevens, Scalia, and Souter. Rehnquist and Kennedy voted to deny, and Blackmun passed.").

[527] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

[528] *Id.* at 982 (Scalia concurring in part and dissenting in part).

[529] *Id.* at 864, 871 (plurality opinion).

[530] *Id.* at 860 (majority opinion).

[531] *Id.* at 855.

[532] *Id.* at 855–56, 860–61.

[533] Gilles, *Right to Elective Abortion*, *supra* note 375, at 719.

[534] *See* Burdick, *supra* note 434, at 826 ("After the *Casey* decision . . . criticism of the standard became widespread.").

[535] *See supra* notes 527–30 and accompanying text; *Casey*, 505 U.S. at 871 (1992)

controversy to end their national division by accepting a common mandate rooted in the Constitution" but failed to explain how abortion is "deeply rooted" in our Nation's law, history, or tradition.[536] It did not resurrect the historical rationale in *Roe* or provide a new constitutional rationale for *Roe*. The closest the plurality came to addressing a constitutional rationale for a right to abortion was simply to refer to *Roe*'s "explication of individual liberty." The plurality thought it was enough to replace the "P" word (privacy) with the "L" word (liberty).

To reaffirm *Roe*, *Casey* also substantially overhauled *Roe*.[537] As Gilles pointed out, "[i]t is not generally appreciated that *Casey* reinvented the doctrinal foundation of the right to elective abortion."[538] *Casey* did not justify a constitutional right to abortion before viability.[539] Even if five Justices reaffirmed *Roe*'s holding that women have a constitutional right to abortion before viability, the Court "restructured the right and placed it on a different foundation."[540] Five Justices agreeing to an unsettled and deeply criticized precedent is not reaffirming that precedent on the merits; nor does it reaffirm the precedent's rationale or provide a new one.

("We do not need to say whether . . . [we] would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

[536] *Casey*, 505 U.S. at 867; *accord* Gilles, *Right to Elective Abortion*, *supra* note 375, at 718–19.

[537] Paulsen, *Worst Constitutional Decision*, *supra* note 264, at 997–98; Gilles, *Right to Elective Abortion*, *supra* note 375, at 701 ("*Casey* adopted a new, interest-balancing framework . . . ."); Linton, *Flight from Reason*, *supra* note 264, at 34–37 (detailing the differences between *Roe* and *Casey*).

[538] Gilles, *Right to Elective Abortion*, *supra* note 375, at 701.

[539] *Casey*, 505 U.S. at 846; Cass Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1742–43, 1742 n.26 (1993) (writing that *Casey* is an "incompletely theorized" decision); Linton, *Flight from Reason*, *supra* note 264, at 16–17.

[540] Gilles, *Right to Elective Abortion*, *supra* note 375, at 691; *accord* Casey, 505 U.S. at 846.

Numerous scholars have recognized that the Court did not settle the issue in *Roe*[541] or *Casey*.[542] *Casey* has remained unsettled by *Fargo Women's Health Organization v. Schafer*,[543] *Leavitt v. Jane L.*, *Janklow v. Planned Parenthood*, *Stenberg v. Carhart, Gonzales v. Carhart*, *Whole Woman's Health v. Hellerstedt*, and *June Medical Services v. Russo*.

Casey did not settle the standard of review in abortion cases, and several lower court judges have criticized this. Judges Wiener and Parker of the Fifth Circuit noted in 1999: "The *Casey* Court provided little, if any, instruction regarding the type of inquiry lower courts should undertake to determine whether a regulation has the 'purpose' of imposing an undue burden on a woman's right to seek an abortion."[544] Judge Frank Easterbrook observed in 2002:

> When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We

[541] DELLAPENNA, *supra* note 264, at 787, 787 & n.76 ("Rather than settling the issue of the extent to which abortion should be available in the United States, the *Roe* decision actually fueled the great controversy that continues to bedevil political life in the United States today." (citing RUTH COLKER, ABORTION & DIALOGUE—PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW 115–25 (1992); BARBARA HINKSON CRAIG & DAVID O'BRIEN, ABORTION AND AMERICAN POLITICS 32 (1993); LEE EPSTEIN & JOSEPH KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 207, 292 (1992); MARIAN FAUX, *ROE V. WADE*: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL 179 (1988); FAYE GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY 43, 72 (1989); MARK GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 21 (1996); JANET HADLEY, ABORTION: BETWEEN FREEDOM AND NECESSITY 3–5; KERRY JACOBY, SOULS, BODIES, SPIRITS: THE DRIVE TO ABOLISH ABORTION SINCE 1973, at 27–28, 95–96, 103-05 (1988); EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 371–72 (1998); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 125–26, 137 (1984); EVA RUBIN, ABORTION, POLITICS, AND THE COURTS 186–88 (rev. ed. 1987); Marcy Wilder, *The Rule of Law, the Rise of Violence, and the Role of Morality: Reframing America's Abortion Debate*, *in* ABORTION WARS 73, 79–81 (Rickie Solinger ed., 1998))).

[542] Garrow, *supra* note 434, at 1–2 (showing continued criticism of *Casey*); Gilles, *Right to Elective Abortion*, *supra* note 375, at 694 (discussing the internal disagreement within the Court); Fallon, *supra* note 241, at 1116 ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Gerhardt, *Super Precedent*, *supra* note 498, at 1220 (explaining *Roe* cannot be considered a "super precedent" in part because calls for its demise by national political leaders have never retreated).

[543] For the confusion spawned by *Fargo*, see Kevin Martin*, Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence,* 99 COLUM. L. REV. 173 (1999) (explaining the circuit split left unresolved by *Casey*).

[544] Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999).

> cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.[545]

CONCLUSION

By every measure in Supreme Court caselaw, *Roe v. Wade* is unsettled. Forty-nine years and repeated failed attempts to establish a stable and consistent standard of review, exhibited again in *June Medical Services v. Russo,* demonstrate that fact. The lack of an evidentiary record in *Roe* and *Doe*, the sweeping scope of the decision, the invalidation of fifty state laws resulting in a public health vacuum, and the Court's unprecedented role over abortion standards and practices have led to unanticipated consequences that have kept legal and political agitation constant.

Roe has stayed unsettled by a progression of constitutional, congressional, state legislative, scholarly, political, and popular challenges. With nearly every decision since *Akron*, regular predictions of *Roe*'s demise have endured, and have been demonstrated, as well, in virtually every Supreme Court confirmation hearing since the Bork hearings in 1987.[546] The predictions of *Roe*'s demise are frequent and widespread. And these data negate any reasonable settled expectations. The reasons *Roe* is unsettled are deeply ingrained in culture and state law, medicine, and national politics. These conditions and factors are beyond the Court's control. As Edmund Burke said of the American colonies in March 1775, "[A] nation is not governed which is perpetually to be conquered."[547]

The goals of stare decisis—continuity, clarity, stability, predictability—cannot be secured by the continued application of *Roe*

---

[545] A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002).

[546] *See* ILYA SHAPIRO, SUPREME DISORDER: JUDICIAL NOMINATIONS AND THE POLITICS OF AMERICA'S HIGHEST COURT 105–06 (2020) ("*Roe*, more than any other case or issue, is central to the modern war over the Court and the judiciary writ large."); JAN CRAWFORD GREENBURG, SUPREME CONFLICT 221 (2007) ("*Roe v. Wade*. . . . The landmark decision that is both a rallying cry and a dividing line, that is passionately viewed as either a key protector of women's rights or a lawless exercise in judicial overreaching, that has reshaped the nation's political parties and has been a core issue in everything from school board elections to presidential contests, that has become the ultimate touchstone in the ongoing conflict over culture and values throughout America, has for more than two decades consumed Supreme Court nominations and confirmation proceedings.").

[547] EDMUND BURKE, SPEECH ON *CONCILIATION WITH AMERICA* (Albert S. Cook ed. 1898) (giving speech on Mar. 22, 1775).

in its unsettled condition. Which version or standard of review would the Court adopt? What reason is there to think that the Court could settle *Roe* in 2021 by continuing to apply it?

If a precedent is unsettled, any subsequent decision based on it is also unsettled. If precedent is unsettled, values of stability, predictability, certainty, continuity are absent and the unsettled status of the precedent has failed to produce them. By the *Helvering-Adarand* doctrine, the Court should "bow[] to the lessons of experience and the force of better reasoning."[548]

Since stare decisis has been consistently identified as a judicial policy by federal and state courts—because settled law has a relationship to the reliability, faithfulness, and effectiveness of the judiciary—applying the rule of law to *Roe* requires respect for the caselaw on settled law. To the extent that *stare decisis et quieta non movere* has become part of the rule of law, the Court's failure to settle *Roe* after 49 years—and the political and cultural damage caused by that failure—should caution the Court to extricate itself from the issue, decentralize the issue, and return the abortion issue to the States clearly and completely, where public policy might better align with public opinion. Over time, as Americans understand the consequences—that immediate change will be limited and recognize the diversity of abortion policy through federalism—it will be good for the Court. Many will wonder why it did not happen sooner. And it will be recognized as the right decision for the Court and our politics.

[548] Burnet v. Coronado Oil & Gas Co., 285 U.S. 389, 407–08 (1932) (Brandeis, J., dissenting).

NEUTRALIZING STATE CONSTITUTIONS AS A SOURCE OF ABORTION RIGHTS: THE PATH FORWARD

Paul Benjamin Linton[*]

TABLE OF CONTENTS

INTRODUCTION

I. STATES MAY ELIMINATE OR LIMIT THE SCOPE OF STATE CONSTITUTIONAL RIGHTS

A. Abortion

1. Florida
2. Tennessee
3. West Virginia

B. Affirmative Action

1. California
2. Michigan

C. Busing (California)
D. Eliminating De Facto Segregation in Public Schools (California)
E. The Death Penalty

1. California
2. Florida
3. Massachusetts

---

[*] Mr. Linton is an attorney in private practice who specializes in state and federal constitutional law, legislative consulting, and scholarly writing. He has submitted *amicus curiae* briefs on beginning-of-life and end-of-life issues in the United States Supreme Court, most of the federal courts of appeals and more than one-half of all the state reviewing courts in the United States. He has published two dozen law review articles on a wide variety of subjects, including the history of abortion regulation, assisted suicide, criminal law, sex discrimination, state equal rights amendments, and religious freedom guarantees under state constitutions. In January 2020, he published the third edition of his book, ABORTION UNDER STATE CONSTITUTIONS (Carolina Academic Press), the only comprehensive analysis of abortion as a state constitutional right. The author wishes to express his appreciation to the Thomas More Society (Chicago, Illinois) and its President and Chief Counsel, Thomas Brejcha, for their support and encouragement in the research and writing of this Article.

4. New Jersy

F. Same-Sex Marriage

1. Alaska
2. California
3. Hawaii
4. Massachusetts
5. Oregon

G. Search and Seizure

1. California
2. Florida

SUMMARY: PART I

II. FEDERAL FLOORS AND STATE CEILINGS

SUMMARY: PART II

III. DRAFTING STATE CONSTITUTIONAL AMENDMENTS ON ABORTION

SUMMARY: PART III

CONCLUSION

Appendix

INTRODUCTION

Several states are considering amendments to their state constitutions that would prevent (or effectively overturn) state court decisions recognizing a state constitutional right to abortion that is separate from, and independent of, the federal right to abortion the Supreme Court recognized in *Roe v. Wade*.[1] Typically, these amendments provide, at a minimum, that nothing in the state constitution protects or confers a right to abortion or the funding

[1] In light of the unauthorized release on Monday, May 2, 2022, of what appears to be the first draft of an opinion by Justice Alito in *Dobbs v. Jackson Women's Health Organization*, No.19-1392, dated Feb. 10, 2022, indicating that a majority of the Supreme Court has agreed to overrule *Roe v. Wade*, the importance of state constitutions in shaping the debate over abortion policy is even more significant, assuming, of course, that the Court's actual opinion reflects the draft opinion.

thereof. Voters have approved such provisions in Alabama,[2] Arkansas,[3] Louisiana,[4] Tennessee,[5] and West Virginia,[6] as well as in the adoption of a new constitution in Rhode Island in 1986.[7] More limited state constitutional amendments have been approved in Colorado (prohibiting public funding of abortion)[8] and Florida (authorizing a parental notice law with a judicial bypass mechanism).[9] State

---

[2] ALA. CONST. art. I, § 36.06 ("(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life. (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate. (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.").

[3] ARK. CONST. amend. LXVIII, §§ 1–3 ("No public funds will be used to pay for any abortion, except to save the mother's life. The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution. This amendment will not affect contraceptives or require an appropriation of public funds.").

[4] LA. CONST. art. I, § 20.1 ("To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion or require the funding of abortion.").

[5] TENN. CONST. art. I, § 36 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.").

[6] W. VA. CONST. art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.").

[7] R.I. CONST. art. I, § 2 ("All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. *Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof*." (emphasis added)).

[8] COLO. CONST. art. V, § 50 ("No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.") In *Hern v. Beye*, 57 F.3d 906, 913 (10th Cir. 1995), the Tenth Circuit interpreted this amendment so that in cases of rape and incest, the state must permit Medicaid-eligible women to obtain state funding for their abortions.

[9] FLA. CONST. art. X, § 22 ("The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for

amendments that would neutralize the state constitution as a source of a right to abortion or public funding and overturn state supreme court decisions recognizing a state right to abortion have been proposed by the Iowa[10] and Kansas[11] legislatures. The Iowa measure must pass in two successive legislatures before it may appear on the ballot, while the Kansas measure will appear on the ballot in 2022.[12] In addition to these two measures, the Kentucky legislature has proposed an abortion neutrality amendment that will appear on the ballot in 2022.[13] Given that twelve state supreme courts have already recognized a state constitutional right to abortion[14] and a thirteenth

---

notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial wavier of the notification.").

[10] The Iowa legislature has approved an amendment that would add a new section to the Iowa Bill of Rights, stating, "To defend the dignity of all human life and protect unborn children from efforts to expand abortion even to the point of birth, we the people of the state of Iowa declare that this Constitution does not recognize, grant or secure a right to abortion or require the public funding of abortion." H.R.J. Res. 5, 89th Gen. Assemb., 2021 Sess. (Iowa 2021).

[11] The amendment, if approved by the voters, would add a new section to the Kansas Bill of Rights in section 22, which would state:

> Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother.

H.R. Con. Res. 5003, 2021 Leg., 2021 Sess. (Kan. 2021).

[12] *Kansas No Right to Abortion in Constitution Amendment (August 2022)*, BALLOTPEDIA, https://ballotpedia.org/Kansas_No_Right_to_Abortion_in_Constitution_Amendment_(August_2022) (last visited Apr. 6, 2022).

[13] Victoria Antram, *Kentucky Voters Will Decide an Amendment in 2022 Saying There Is No Right to Abortion in the State Constitution*, BALLOTPEDIA NEWS (Mar. 31, 2021, 7:35 PM), https://news.ballotpedia.org/2021/03/31/kentucky-voters-will-decide-an-amendment-in-2022-saying-there-is-no-right-to-abortion-in-the-state-constitution/. The amendment, if approved by the voters, would add a new section to the Kentucky constitution at Section 26A which would state: "To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion." H.B. 91, 2021 Gen. Assemb., 2021 Reg. Sess. (Ky. 2021).

[14] Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 968–70 (Alaska 1997); Comm. to Def. Reprod. Rts. v. Myers, 625 P.2d 779, 804–07 (Cal. 1981); *In re* T.W., 551 So. 2d 1186, 1196 (Fla. 1989); Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 245–46 (Iowa 2018); Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 502 (Kan. 2019); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 397–98 (Mass. 1981); Doe v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995); Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 666 (Miss. 1998); Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999); Right to Choose v. Byrne, 450 A.2d 925, 928 (N.J. 1982); Hope v. Perales, 634 N.E.2d 183, 186–87 (N.Y. 1994); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d

has clearly signaled that it would do so if the issue were presented,[15] the need for abortion neutrality amendments is obvious.[16] The need will be even greater if the Supreme Court overrules *Roe v. Wade* and returns to the states their rightful authority to prohibit abortion. Finally, three other state supreme courts, without deciding whether their state constitutions confer a right to abortion, have struck down, at least in part, state restrictions on public funding of abortions.[17]

This Article answers three questions that arise in connection with state constitutional amendments relating to abortion. First, may states

1, 4 (Tenn. 2000). In *Beacham v. Leahy*, the Vermont Supreme Court struck down the pre-*Roe* law prohibiting abortion except to save the life of the mother, but the basis for the court's decision is unclear because the court cited no provisions of either the state constitution or the federal Constitution. 287 A.2d 836, 837–40 (Vt. 1972).

[15] N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 851 (N.M. 1998). In 2021, New Mexico repealed its pre-*Roe* law, based on the Model Penal Code. *See* S.B. 10, 2021 Reg. Sess. (N.M. 2021) (repealing statutory provisions criminalizing certain abortions). Given the prevailing political climate in New Mexico as evidenced by the passage of the repeal, it is very unlikely that the New Mexico legislature will enact any laws regulating, much less prohibiting, abortion. Accordingly, the New Mexico Supreme Court probably will not have an opportunity to make explicit what is already implicit in the *Right to Choose* case, to wit, that the New Mexico Constitution protects a right to abortion. *N.M. Right to Choose*, 975 P.2d at 851.

[16] Of these thirteen states, it is doubtful that an abortion neutrality amendment would ever be proposed and, even if proposed, approved by the voters in California, Massachusetts, Minnesota, New Jersey, New Mexico, or New York. On November 7, 2006, the people of Florida approved a state constitutional amendment (Amendment 3) that raised the percentage needed to adopt a state constitutional amendment from 50% plus one to 60%. FLA. CONST. art. 11, § 5(e). Six years later, on November 6, 2012, the people of Florida defeated an amendment (Amendment 6) that would have prohibited public funding of abortion (subject to narrow exceptions) and also would have prevented the state constitution from being interpreted to confer broader rights to abortion than those conferred by the federal Constitution (the amendment failed to garner even a majority of support from the voters). S.J. Res. 1538, 2011 Sess. (Fla. 2011); *see also Florida Abortion, Amendment 6 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Abortion,_Amendment_6_(2012) (last visited Feb. 18, 2022) (noting that S.J. Res. 1538 was named Amendment 6 when put to a vote in public referendum in November of 2012 and that the referendum failed by a vote of 55% to 45%). Prospects for submission and approval of an abortion neutrality amendment would appear to be more likely in Alaska, Iowa, Kansas, Mississippi, and Montana. The Tennessee constitution has been amended to overturn the *Sundquist* decision. TENN. CONST. art. I, § 36. For the text of the amendment, see *supra* note 5.

[17] *See* Simat Corp. v Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 34–35, 37 (Ariz. 2002) ("We reach no conclusion about whether the Arizona Constitution provides a right of choice, let alone one broader than that found in the federal constitution."); Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003) (failing to address the issue with respect to the Indiana Constitution); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993) (holding that a West Virginia statute providing for state funding of certain maternal care while withholding such funding for abortions violated citizens' *federal* constitutional rights). *Panepinto* has been overturned by a state constitutional amendment. See *supra* note 6, for the text of the amendment. Amendments to overturn the Arizona and Indiana decisions should be politically feasible.

eliminate or limit the scope of state constitutional rights as those rights have been construed by the courts of a given state? Second, does anything in the United States Constitution require states to protect, *as a matter of state constitutional law*, individual rights that have been recognized by the Supreme Court? Third, what kind of state constitutional amendment should be proposed by state legislatures to address the issue of abortion: one that attempts to ban abortions (subject to various exceptions) or one that neutralizes the state constitution as a source of abortion rights?

I. STATES MAY ELIMINATE OR LIMIT THE SCOPE OF STATE CONSTITUTIONAL RIGHTS

One of the questions that arises in connection with abortion neutrality amendments is whether the people of a state—acting indirectly through their state legislature or directly through a citizen initiative (where such initiatives are permitted)—have the authority to propose an amendment to their constitution that would eliminate or limit a right under a provision of the state Declaration (or Bill) of Rights, as that provision has been interpreted by the supreme court (or other court) of that state. As the list of state constitutional amendments described in what follows demonstrates, the answer is an unequivocal "yes." On a broad range of issues, state constitutions have been amended to rein in state court decisions that the people of a given state have rejected. There is no legal impediment to the people of a state deciding that a state court's interpretation of their constitution should be overturned.

A. Abortion

1. Florida

In *North Florida Women's Health & Counseling Services, Inc. v. State*,[18] the Florida Supreme Court held that the State's parental notice of abortion statute violated the right of privacy guaranteed by article I, section 23 of the Florida Constitution.[19] In response, the Florida legislature proposed and the people of Florida approved (on November 2, 2004) an amendment to the state constitution (Amendment 1) that expressly authorized the legislature to enact a parental notice statute (subject to federal constitutional

---

[18] 866 So. 2d 612 (Fla. 2003).

[19] *Id.* at 620, 639–40. The Florida Constitution provides, in relevant part, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." FLA CONST. art. I, § 23.

requirements).[20] That amendment "in effect overruled *North Florida*."[21]

2. Tennessee

In *Planned Parenthood of Middle Tennessee v. Sundquist*,[22] the Tennessee Supreme Court held that the implied right of privacy the court had previously derived from multiple provisions of the Tennessee Constitution included a fundamental right to abortion.[23] On the basis of that right, the court struck down a number of state abortion regulations, including a forty-eight hour waiting period, a second-trimester hospitalization requirement, and a requirement that the attending physician personally provide certain information to his patient before performing an abortion.[24] In response, the Tennessee legislature proposed and the people of Tennessee approved (on November 4, 2014) an amendment to the state constitution (Amendment 1) that effectively overturned the *Sundquist* decision and neutralized the state constitution as a source of abortion rights.[25]

3. West Virginia

In *Women's Health Center of West Virginia, Inc. v. Panepinto*,[26] the West Virginia Supreme Court of Appeals held that the State's restrictions on public funding of abortion violated the "common benefit" provision of the West Virginia Constitution, article III, section 3.[27] The

---

[20] FLA. CONST. art. X, § 22. For the text of article X, section 22, see *supra* note 9.

[21] State v. Gainesville Woman Care, LLC, 187 So. 3d 279, 282 (Fla. Dist. Ct. App. 2016), *rev'd on other grounds*, 210 So. 3d 1243, 1265 (Fla. 2017); *see also In re* Doe, 136 So. 3d 723, 724 (Fla. Dist. Ct. App. 2014) (Roberts, J., concurring in result) ("In 2004, the people of Florida explicitly amended the Constitution to authorize the legislature to require parental notification.").

[22] 38 S.W.3d 1 (Tenn. 2000).

[23] *Id.* at 25.

[24] *Id.* at 18–25.

[25] TENN. CONST. art. I, § 36 (stating that no part of the Tennessee Constitution protects a right to abortion, expressly contradicting the conclusion drawn by the court in *Sundquist* that the Tennessee Constitution implicitly guaranteed a right to abortion). For the text of art. I, section 36, see *supra* note 5.

[26] 446 S.E.2d 658 (W. Va. 1993).

[27] *Id.* at 666–67; *see also* W. VA. CONST. art. III, § 3 ("Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.").

West Virginia legislature later proposed and the people of West Virginia approved (on November 6, 2018) an amendment to the state constitution (Amendment 1) that effectively overturned the *Panepinto* decision and neutralized the state constitution as a source of abortion rights.[28]

B. Affirmative Action

1. California

In the early 1980s, the California Supreme Court held that state and local affirmative action policies, which established preferences for minorities and women in public employment and public education, did not violate the equal protection guarantee of the California Constitution, article I, section 7(a).[29] In response to the widespread adoption of affirmative action policies, the people of California approved (on November 5, 1996) a citizen initiative (Proposition 209) that amended the state constitution by adding a new section to the California Declaration of Rights.[30] Section 31 forbids affirmative action

---

[28] *See* W. VA. CONST. art. VI, § 57 (explaining that the Constitution of West Virginia does not protect the right to an abortion). For the text of article VI, section 57, see *supra* note 6. As previously noted, *see supra* note 17, the West Virginia Supreme Court of Appeals elected *not* to decide whether the West Virginia Constitution protects a right to abortion.

[29] *See, e.g.*, Price v. Civ. Serv. Comm'n, 604 P.2d 1365, 1382 (Cal. 1980) (upholding a statutory provision authorizing affirmative action); DeRonde v. Regents of the Univ. of Cal., 625 P.2d 220, 228–29 (Cal. 1981) (permitting California public universities acting in good faith to practice affirmative action).

[30] Article I, section 31 of the California Constitution provides:

> (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
>
> (b) This section shall apply only to action taken after the section's effective date.
>
> (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
>
> (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
>
> (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

policies in public employment, public education, and public contracting that had been "aimed at overcoming the continuing effects of past societal discrimination against racial minorities and women."[31] This had the effect of "modifying the protections that the [California] Constitution otherwise would afford to groups that historically have been the subject of prejudice and discrimination."[32] In *Hi-Voltage Wire Works*, *Inc. v. City of San Jose*,[33] the California Supreme Court struck down, on the basis of Proposition 209, an affirmative action plan adopted by San Jose.[34]

2. Michigan

In the 1980s, the Michigan Court of Appeals upheld the validity of state and local affirmative action policies that established preferences for minorities and women in public employment. In *Local 526-M, Michigan Corrections Organization v. State*,[35] the court stated that "race and sex may be factors used by an employer when the plan is

---

> (f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.
>
> (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
>
> (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

CAL. CONST. art. I, § 31.

[31] Strauss v. Horton, 207 P.3d 48, 103 (Cal. 2009). On November 3, 2020, the people of California overwhelmingly rejected a legislatively-proposed measure (Proposition 16) that would have repealed Proposition 209. ALEX PADILLA, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 3, 2020, at 67 (2020).

[32] *Strauss*, 207 P.3d at 103.

[33] 12 P.3d 1068 (Cal. 2000).

[34] *Id.* at 1070. In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit rejected a federal constitutional challenge to Proposition 209, rejecting the argument that the amendment was violative of the Equal Protection Clause of the United States Constitution merely because it forbade consideration of race in public matters. 122 F.3d 692, 709–11 (9th Cir. 1997).

[35] 313 N.W.2d 143, 148 (Mich. Ct. App. 1981) (rejecting a state constitutional challenge to an affirmative action plan).

designed in an effort to correct prior discriminatory practices and a present selection method may not be free from discriminatory effects."[36] In *Kulek v. City of Mt. Clemens*,[37] the court strongly implied that a "determination of prior discrimination" is not required "to support an affirmative action plan which attempts to correct a manifest imbalance in the representation of qualified minorities and women in various job categories."[38] In response to the widespread adoption of affirmative action policies, the people of Michigan approved (on November 7, 2006) a citizen initiative (Proposal 2) that amended the state constitution to forbid affirmative action policies.[39] Prior to its adoption, the Michigan Court of Appeals rejected an effort to bar the measure from appearing on the ballot on the ground that it altered the equal protection guarantee of the state constitution (article I, section 2) or rendered that guarantee "wholly inoperative" without referencing article I, section 2.[40]

C. Busing (California)

In 1976, the California Supreme Court interpreted the state equal protection guarantee (article I, section 7(a)) to authorize state courts to order busing of public school students as a remedy for *de facto* segregation,[41] even though such segregation does not violate the Equal Protection Clause of the Fourteenth Amendment.[42] In response, the people of California adopted (on November 6, 1979) a citizen initiative (Proposition 1) that amended article I, section 7(a) to prohibit state

---

[36] *Id.*

[37] 416 N.W.2d 321 (Mich. Ct. App. 1987).

[38] *Id.* at 325 n.2 (citing Johnson v. Transp. Agency, 480 U.S. 616, 640–42 (1987)).

[39] *See* MICH. CONST. art. I, § 26 (forbidding state and local government discrimination or preferential treatment on the basis of sex or race, and requiring that remedies available to victims of such discrimination be consistent irrespective of the victim's sex or race); SUZANNE LOWE, SEPTEMBER 2006 BALLOT PROPOSAL 06-2: AN OVERVIEW 1–3 (2006).

[40] Coal. to Def. Affirmative Action & Integration v. Bd. of State Canvassers, 686 N.W.2d 287, 292 (Mich. Ct. App. 2004). In *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court rejected a federal constitutional challenge to Proposal 2. 572 U.S. 291, 312–14 (2014).

[41] *See* Crawford v. Bd. of Educ., 551 P.2d 28, 35–36, 47–48 (Cal. 1976) (finding that the equal protection clause of the California Constitution requires local school boards to take action to prevent even mere *de facto* segregation).

[42] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007). Justice Kennedy elaborated in his concurrence:

> Our cases [have] recognized a fundamental difference between those school districts that had engaged in *de jure* segregation and those whose segregation was the result of other factors. School districts that had engaged in *de jure* segregation had an affirmative constitutional duty to desegregate; those that were *de facto* segregated did not.

Id. at 794 (Kennedy, J., concurring in part and concurring in the judgment).

courts, in desegregation cases, from ordering school boards to mandate reassignment and transportation of pupils on the basis of race, except to remedy a violation of the federal Equal Protection Clause.[43] The amendment also provided that any previously issued court order that contained a mandatory reassignment provision could be modified by proper application to a court having jurisdiction over the matter,

---

[43] Article I, section 7(a), as amended by Proposition 1, reads as follows:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
>
> Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.
>
> In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.
>
> Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.
>
> In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this State and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

CAL. CONST. art. I, § 7(a) (West, Westlaw through the 1986 portion of the 1985–86 Reg. Sess. of the Cal. Leg.).

unless modification was precluded by the United States Constitution.[44] Subsequent to its adoption, the California Court of Appeal rejected various state (and federal) constitutional challenges to the measure.[45] The California Supreme Court later described Proposition 1 as an example of a state constitutional amendment proposed by the state legislature and approved by the people that "diminish[ed] the state constitutional rights of a minority group."[46]

D. Eliminating De Facto Segregation in Public Schools (California)

Closely related to busing, in a series of cases decided in the 1960s and 1970s, the California Supreme Court held that "school boards in this state bear a constitutional obligation to undertake reasonably feasible steps to alleviate . . . racial segregation in the public schools, *[r]egardless of the cause of such segregation*."[47] Under these cases, school boards were required to take steps to eliminate or minimize racial imbalance in public schools, even if the imbalance resulted not from *de jure* segregation (segregation imposed by law), but from *de facto* segregation (segregation that resulted from economic or other circumstances not attributable to the State).[48] The "constitutional obligation[]" to address *de facto* segregation was required, not by the Equal Protection Clause of the Fourteenth Amendment, which prohibits only *de jure* segregation, but by the equal protection guarantee of the California Constitution (article I, section 7(a)).[49] This body of law, with respect to alleviating *de facto* segregation, was overturned by the adoption of Proposition 209, a citizen initiative, on November 5, 1996.[50] In a post-adoption decision, the California Court

---

[44] *Id.*

[45] *See* Crawford v. Bd. of Educ., 170 Cal. Rptr. 495, 507 n.5 (Cal. Ct. App. 1980) (dismissing a claim that the constitutional provision in question wrongly addressed more than one subject), *aff'd*, 458 U.S. 527, 544–45 (1982) (rejecting a federal constitutional challenge to Proposition 1); Tinsley v. Superior Ct., 197 Cal. Rptr. 643, 652–54 (Cal. Ct. App. 1983) (dismissing single-subject and other state law objections).

[46] Strauss v. Horton, 207 P.3d 48, 104 (Cal. 2009).

[47] Crawford v. Bd. of Educ., 551 P.2d 28, 30 (Cal. 1976) (emphasis added); *see also* S.F. Unified Sch. Dist. v. Johnson, 479 P.2d 669, 675–77 (Cal. 1971) (finding that it is permissible to rely upon racial considerations to establish policies intended to combat broader racial discrimination in the long term).

[48] *S.F. Unified*, 479 P.2d at 675–77; *see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (noting the important distinction between *de jure* segregation, or "segregation by state action," and *de facto* segregation, or "racial imbalance caused by other factors").

[49] *Crawford*, 551 P.2d at 35–36 (explaining the constitutional obligations on school districts as required by the California Constitution, not the federal Constitution); CAL. CONST. art. I, § 7(a).

[50] *See* CAL. CONST. art. 1, § 31 (forbidding all branches of state and local

of Appeal, referring to the conflict between the earlier decisions of the California Supreme Court interpreting article I, section 7(a) of the California Constitution and the newly adopted article I, section 31, referred to the "firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls."[51] Whatever may be "the potential benefits of attending a racially and ethnically diverse school," the court concluded, "*the people have spoken*."[52] "California Constitution, article I, section 31 is clear in its prohibition against discrimination or preferential treatment based on race, sex, color, ethnicity or national origin. Thus, the racial balancing component of the District's open transfer policy is invalid under our state Constitution."[53]

E. The Death Penalty

1. California

In 1972, the California Supreme Court held that California's death penalty statute violated the prohibition against "cruel *or* unusual punishments" set forth in article I, section 6 (now article I, section 17).[54] Only a few months later, the people of California approved (on November 7, 1972) a citizen initiative (Proposition 17) that effectively overturned *Anderson*, neutralizing article I, section 6 and any other provision of the California Constitution as a basis for invalidating any statute authorizing the imposition of the death penalty.[55] Seven years later, the California Supreme Court rejected a

---

government, including public schools and universities, from considering race, sex, or ethnicity in employment- or education-related decisions). For the text of article 1, section 31, see *supra* note 30. As previously noted, the Ninth Circuit Court of Appeals rejected a federal constitutional challenge to Proposition 209. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997).

[51] Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 98, 104 (Cal. Ct. App. 2002).

[52] *Crawford*, 121 Cal. Rptr. 2d at 104 (emphasis added).

[53] *Id.* As previously noted, on November 3, 2020, the people of California defeated an effort to repeal Proposition 209. PADILLA, *supra* note 31, at 67.

[54] People v. Anderson, 493 P.2d 880, 891 (Cal. 1972) (citing CAL. CONST. art. I, § 17) ("Cruel or unusual punishment may not be inflicted or excessive fines imposed.").

[55] *See* CAL. CONST. art. I, § 27 ("All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."); *California Proposition 17, Death Penalty in the California Constitution (1972)*, BALLOTPEDIA, https://ballotpedia.org/California_

state constitutional challenge to Proposition 17 (that Proposition 17 constituted an impermissible revision, instead of an amendment, to the constitution).[56]

2. Florida

Prior to 2002, the Florida Constitution prohibited "cruel *or* unusual punishment."[57] The Eighth Amendment to the United States Constitution prohibits "cruel *and* unusual punishments."[58] Based on the use of the disjunctive "or" in the state constitution, as compared to the use of the conjunctive "and" in the federal Constitution, the Florida Supreme Court held in a series of cases that article I, section 17 "provide[d] protection against both 'cruel punishments' *and* 'unusual punishments.'"[59] "Thus, the Florida Constitution provides a greater freedom in this regard than does the federal."[60] Although the Florida Supreme Court did not often give article I, section 17 a broader reading than the Supreme Court has to the Eighth Amendment, it did require a "proportionality review" of all death sentences,[61] a type of review not mandated by the Eighth Amendment.[62]

On November 5, 2002, the people of Florida approved a legislatively-proposed amendment (Amendment 1) to article I, section 17, that changed the prohibition of "cruel or unusual punishment" to "cruel and unusual punishment" and conformed to the interpretation of section 17 to the Supreme Court's interpretation of the Eighth

---

Proposition_17,_Death_Penalty_in_the_California_Constitution_ (1972) (last visited Mar. 14, 2022).

[56] *See* People v. Frierson, 599 P.2d 587, 614 (Cal. 1979) (finding that the amendment in question was less broad than a constitutional revision because the California Supreme Court retained the power to review any death sentences to ensure they were constitutional).

[57] FLA. CONST. art. I, § 17 (emphasis added) (West, Westlaw through laws passed during the Second Reg. Sess. of the 14th Leg. (1996)).

[58] U.S. CONST. amend. VIII (emphasis added).

[59] Phillips v. State, 807 So. 2d 713, 718–19 (Fla. Dist. Ct. App. 2002) (citing Allen v. State, 636 So. 2d 494, 497 n.5 (Fla. 1994); Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991); Armstrong v. Harris, 773 So. 2d 7, 17 n.26 (Fla. 2000)).

[60] *Phillips*, 807 So. 2d at 719.

[61] *Tillman*, 591 So. 2d at 168–69.

[62] *See* Pulley v. Harris, 465 U.S. 37, 42–44 (1984) (explaining that the Eighth Amendment does not require a court to compare the penalty one criminal convict faces with the penalties others have faced for the same conviction when evaluating the appropriateness of a sentence).

Amendment.[63] In *Lawrence v. State*,[64] the Florida Supreme Court held that, under Amendment 1, the court was forbidden "from analyzing death sentences for comparative proportionality in the absence of a statute establishing that review."[65]

Speaking more broadly of the Florida legislature's authority to propose amendments to the Florida Declaration of Rights, the Florida Supreme Court has expressly acknowledged that the Florida legislature

> is free to question the wisdom of the Founding Fathers and propose the striking of the Cruel or Unusual Punishment Clause, the Due Process Clause, the Right to Bear Arms Clause, the Freedom of Speech Clause, the Freedom of Religion Clause, or any other basic right enumerated in the Declaration of Rights.[66]

---

[63] Article I, Section 17 of the Florida Constitution, as amended by Amendment 1, reads as follows:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

FLA. CONST. art. I, § 17. The Ballot Summary accompanying the measure expressly informed the voters that Amendment 1 "*effectively nullifies rights allowed under the state prohibition against cruel or unusual punishment which may afford greater protections for those subject to punishments for crime than will be provided by the amendment*." Sancho v. Smith, 860 So. 2d 856, 860 (Fla. Dist. Ct. App. 2002) (emphasis added) (rejecting challenge to ballot measure).

[64] 308 So. 3d 544 (Fla. 2020).

[65] *Id.* at 545; *see also* Bowles v. State, 276 So. 3d 791, 796 (Fla. 2019) (holding that imposition of the death penalty "does not constitute cruel and unusual punishment" under article I, section 17).

[66] Armstrong v. Harris, 773 So. 2d 7, 21–22 (Fla. 2000).

3. Massachusetts

In *District Attorney for the Suffolk District v. Watson*,[67] the Massachusetts Supreme Judicial Court held that the imposition of the death penalty violated article XXVI of the Massachusetts Declaration of Rights, which prohibits the infliction of "cruel or unusual punishment," because it "is unacceptably cruel under contemporary standards of decency" and "administered with unconstitutional arbitrariness and discrimination."[68] In response, the Massachusetts legislature proposed and the people of Massachusetts approved (on November 2, 1982) an amendment to the state constitution (Question 2) that added the following language to article XXVI:

> No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court [the Massachusetts legislature] may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.[69]

4. New Jersey

In *State v. Gerald* in 1988, the New Jersey Supreme Court held that imposition of the death penalty on one who killed another person without the intent to cause death or knowledge that death would ensue was "grossly disproportionate" to the offense and therefore violated Article I, Paragraph 12 of the New Jersey Constitution, which prohibits "cruel and unusual punishments."[70] Under the holding in *Gerald*, an intent to cause (or knowingly causing) great bodily harm resulting in death could not justify imposition of the death penalty, even though, for purposes of the Eighth Amendment's prohibition of "cruel and unusual punishments," "capital punishment may be imposed on one who commits a homicide without the purpose or knowledge that death will result."[71] In *Gerald*, the court concluded that article I, paragraph 12 of the state constitution "affords greater protections to capital

---

[67] 411 N.E.2d 1274 (Mass. 1980).

[68] *Id.* at 1275, 1281–87. At the time the case was decided, article XXVI provided, "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." MASS. CONST. pt. 1, art. XXVI.

[69] MASS. CONST. amend. CXVI.

[70] State v. Gerald, 549 A.2d 792, 810–11, 816, 818 (N.J. 1988).

[71] *Id.* at 809–10 (citing Tison v. Arizona, 481 U.S. 137, 157 (1987)).

defendants than does the eighth amendment of the federal constitution."[72]

In response to *Gerald* and its progeny (invalidating multiple death sentences),[73] the New Jersey legislature proposed and the people of New Jersey approved (on November 3, 1992) an amendment to the state constitution (Public Question No. 3) that added the following language to article I, paragraph 12:

> It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value.[74]

Subsequent to the approval of Public Question No. 3, the New Jersey Supreme Court held that to prevail on a capital murder conviction based on serious bodily injury, the prosecution must prove "that it was the defendant's conscious object to cause serious bodily injury that then resulted in the victim's death, knew that the injury created a substantial risk of death and that it was highly probable that death would result."[75]

---

[72] *Id.* at 811.

[73] *See* State v. Davis, 561 A.2d 1082, 1084 (N.J. 1989) (overturning a sentence for capital murder over the defendant's own guilty plea because of the novel precedent set by *Gerald* while this case was pending); State v. Jackson, 572 A.2d 607, 611 (N.J. 1990) (overturning a death sentence and remanding for retrial because the trial court's decision was inconsistent with *Gerald*); State v. Coyle, 574 A.2d 951, 954, 974 (N.J. 1990) (overturning a conviction and death sentence and remanding for retrial due to errors both in the penalty and sentencing phases of the trial, particularly in that the defendant made a plea without knowledge of certain rights that were granted him by *Gerald* while this case was pending); State v. Long, 575 A.2d 435, 467 (N.J. 1990) (overturning a death sentence and remanding for retrial because the new precedent of *Gerald* invalidated the prior conviction); State v. Pennington, 575 A.2d 816, 820 (N.J. 1990) (overturning a death sentence because the defendant intended only to commit serious bodily injury and not to kill, and the jury was not instructed about this distinction, violating the new precedent set by *Gerald*); State v. Clausell, 580 A.2d 221, 224–25 (N.J. 1990) (overturning a death sentence because the defendant intended only to commit serious bodily injury and not to kill, and the jury was not instructed about this distinction, violating the new precedent set by *Gerald*); State v. Harvey, 581 A.2d 483, 484 (N.J. 1990) (overturning a death sentence and remanding for retrial because jury instructions were incompatible with *Gerald*).

[74] N.J. CONST. art. I, para. 12.

[75] State v. Cruz, 749 A.2d 832, 840 (N.J. 2000). The New Jersey legislature repealed the death penalty in 2007. 2007 N.J. Laws 1427–30.

F. Same-Sex Marriage

1. Alaska

In *Brause v. Bureau of Vital Statistics*,[76] decided on February 27, 1998, an Alaska Superior Court held that the Alaska statutes that restricted marriage to one man and one woman interfered with the state constitutional right of privacy (article I, section 22), and could be upheld only if those statutes satisfied the strict scrutiny standard of judicial review.[77] Statutes reviewed under that standard are almost never upheld. Before the superior court could enter a final ruling on the constitutionality of the marriage statutes (which almost certainly would have been struck down), the Alaska legislature proposed, and the people of Alaska approved (on November 3, 1998), an amendment to the state constitution (Measure 2) that defined marriage as a relationship that may exist only between one man and one woman.[78] In light of this amendment, the superior court dismissed the case challenging the statutes. The Alaska Supreme Court later held that the adoption of the amendment mooted the challenge to the validity (under the state constitution) of the State's marriage statutes.[79]

2. California

In *In re Marriage Cases*,[80] decided on May 15, 2008, the California Supreme Court held that the California statutes that restricted marriage to one man and one woman violated the privacy, due process, and equal protection provisions of the California Constitution.[81] Less

---

[76] No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Super. Ct. Alaska Feb. 27, 1998).

[77] *Id.* at *3–6. Article I, section 22 of the Alaska Constitution provides, in relevant part, "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. 1, § 22.

[78] "To be valid or recognized in this State, a marriage may exist only between one man and one woman." Legis. Res. 71, 20th Leg., 2d Reg. Sess. (Alaska 1998); ALASKA CONST. art. I, § 25.

[79] Brause v. State, 21 P.3d 357, 358 (Alaska 2001). Measure 2 and the Alaska statutes restricting marriage to opposite-sex couples were declared unconstitutional on federal grounds in *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1059–60 (D. Alaska 2014). That declaration has no bearing on whether the citizens of Alaska had the authority, under the state constitution, to adopt Measure 2. *Id.* at 1059–73.

[80] 183 P.3d 384 (Cal. 2008).

[81] *Id.* at 451–52. Article I, section 1 of the California Constitution provides, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1. Article I, section 7(a) provides, in relevant part, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." *Id.* art. I, § 7(a).

than six months later, on November 4, 2008, the people of California approved a citizen initiative (Proposition 8) that amended the state constitution to provide that marriage is a relationship that may exist only between a man and a woman.[82] In *Strauss v. Horton*,[83] the California Supreme Court held that the people of California had the authority, under the state constitution, to overturn (prospectively) the court's decision in the marriage cases, even though the effect of Proposition 8 was to lessen the rights of a suspect class (homosexuals) under the state constitution and to diminish the "inalienable" state constitutional right to marry (by restricting that right to opposite-sex couples).[84]

Speaking more broadly of the authority of the people to reduce—by a constitutional amendment—the scope of the guarantees provided by the California Constitution, as interpreted by the California Supreme Court, the *Strauss* court stated:

> Under the California Constitution, the constitutional guarantees afforded to individuals accused of criminal conduct are no less well established or fundamental than the constitutional rights of privacy and due process or the guarantee of equal protection of the laws. As we have seen, in past years a majority of voters have adopted several state constitutional amendments . . . that have diminished state constitutional rights of criminal defendants, as those rights had been interpreted in prior decisions of this court. Although a principal purpose of *all* constitutional provisions establishing individual rights is to serve as a countermajoritarian check on potential actions that may be taken by the legislative or executive branches . . . , our prior decisions . . . establish that the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be modified and diminished *by a change in the state Constitution itself*, effectuated through a constitutional *amendment* approved by a majority of the electors acting pursuant to the initiative power.[85]

---

[82] "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. Proposition 8 was declared unconstitutional on federal grounds in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010). That declaration has no bearing on whether the citizens of California had the authority, under the state constitution, to adopt Proposition 8. *See* CAL. CONST. art. II, § 8 (empowering the people of California to enact state constitutional amendments through public referenda).

[83] 207 P.3d 48 (Cal. 2009).

[84] *Id.* at 102–06, 122.

[85] *Id.* at 105 (citation omitted).

3. Hawaii

In *Baehr v. Lewin*,[86] decided on May 5, 1993, the Hawaii Supreme Court held that the Hawaii statute restricting marriage to one man and one woman discriminated on account of sex (understood to include sexual orientation) and that such discrimination, under the equal protection guarantee of the Hawaii Constitution (article I, section 5) could be upheld only if the State demonstrated that the statute was the least restrictive means of promoting a compelling state interest (the "strict scrutiny" standard of review).[87] On remand, the circuit court, on December 3, 1996, held that the marriage statute violated article I, section 5.[88] The circuit court entered judgment declaring the statute unconstitutional on December 11, 1996. While the circuit court's judgment was on appeal to the Hawaii Supreme Court, the Hawaii legislature proposed and the people of Hawaii approved (on November 3, 1998) an amendment to the state constitution (Question 2) that conferred on the state legislature "the power to reserve marriage to opposite-sex couples."[89] Based on this development, the Hawaii Supreme Court held that the adoption of the amendment provided a constitutional basis for the marriage statute, rendering the plaintiffs' challenge moot.[90] The court reversed the circuit court's judgment and remanded the case for entry of judgment in favor of the State.[91]

4. Massachusetts

In *Goodridge v. Department of Public Health*,[92] the Massachusetts Supreme Judicial Court held that the Massachusetts statute that restricted marriage to opposite-sex couples violated the due process and equal protection guarantees of the Massachusetts Constitution.[93]

---

[86] 852 P.2d 44 (Haw. 1993).

[87] *Id.* at 59–60, 67. Article I, section 5 of the Hawaii Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5.

[88] *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996) (explaining that HRS § 572–1 is unconstitutional because the statute does not further a compelling state interest).

[89] HAW. CONST. art. I, § 23.

[90] Baehr v. Miike, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

[91] *Id.*

[92] 798 N.E.2d 941 (Mass. 2003).

[93] *Id.* at 957–58, 969–70. Article I of the Massachusetts Declaration of Rights, as amended by article CVI of the Amendments to the Massachusetts Constitution, provides:

Following that decision, an initiative petition effort was mounted to overturn the holding in *Goodridge* which, if it had been adopted, would have defined marriage as the union of one man and one woman. After the Massachusetts Attorney General certified the petition, a Massachusetts voter challenged the initiative, arguing that the measure violated a provision in the Massachusetts Constitution prohibiting the initiative process from being used for "reversal of a judicial decision."[94] The Massachusetts Supreme Judicial Court rejected this argument, holding that the initiative, if approved, would have overturned the *Goodridge* holding prospectively but would not have constituted a prohibited "reversal" of a judicial opinion.[95] The initiative failed to qualify for the ballot and was never voted on.

5. Oregon

In *Li v. State*,[96] an Oregon trial court held that the Oregon statutes that restricted marriage to opposite-sex couples denied same-sex couples the equal privileges and immunities guaranteed by the Oregon Constitution (article I, section 20).[97] To remedy this injury, the court gave the Oregon legislature 90 days after commencement of its next session to "balance the substantive rights of same-sex domestic partners with those of opposite-sex married couples."[98] If the legislature failed to act within that period, the plaintiffs would be entitled to the issuance of marriage licenses.[99] The court also ordered the State to register the marriages of several hundred same-sex couples who, prior to the court's order, had obtained a license to be married and had married pursuant to a policy adopted by county

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASS. CONST. pt. 1, art. I, *amended by* MASS. CONST. Articles of Amendment, art. CVI. Article X provides, in relevant part, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." *Id*. pt. 1, art. X.

[94] Schulman v. Att'y Gen., 850 N.E.2d 505, 506 (Mass. 2006) (quoting MASS. CONST. art. II, § 2).

[95] *Id*. at 507–08, 511.

[96] No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004).

[97] *Id.* at *1, *5–6, *10. Article I, section 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

[98] *Li*, 2004 WL 1258167, at *10.

[99] *Id*.

officials.[100] A "revised limited judgment" incorporating these orders was entered on April 29, 2004.[101] While the circuit court's judgment was on appeal, the people of Oregon approved (on November 2, 2004) a citizen initiative (Measure 36) that amended the state constitution to define marriage as a relationship that may exist only between one man and one woman.[102] Based on that amendment, the Oregon Supreme Court held that marriage licenses could not be issued to same-sex couples and that the licenses already issued were void.[103] The court held further that the circuit court had erred in granting relief the plaintiffs had not requested (equal benefits as domestic partners).[104] The supreme court reversed the circuit court and remanded the case to the lower court with instructions to dismiss the plaintiffs' complaint.[105]

G. Search and Seizure

1. California

In a series of cases decided before 1983, the California Supreme Court interpreted the search and seizure provision of the California Constitution (article I, section 13) to provide greater protection against illegal searches and seizures than does the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court.[106] On June 8, 1982, the people of California approved a citizen initiative (Proposition 8) that amended article I, section 28(d) (now article I, section 28(f)(2)). Proposition 8 effectively prohibited

---

[100] *Id.* at *8–9.

[101] Revised Limited Judgment, Li v. State, 2004 WL 4963162 (Or. Cir. Ct. Apr. 29, 2004) (No. 0403-03057).

[102] *See* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1134 (D. Or. 2014) (explaining the timing of the enactment of Measure 36 with regard to *Li v. State*). "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." OR. CONST. art. XV, § 5a.

[103] Li v. State, 110 P.3d 91, 102 (Or. 2005).

[104] *Id.* at 98.

[105] *Id.* at 102. Measure 36 and the Oregon statutes restricting marriage to opposite-sex couples were declared unconstitutional on federal grounds in *Geiger*, 994 F. Supp. 2d at 1134, 1147. That declaration has no bearing on whether the citizens of Oregon had the authority, under the state constitution, to adopt Measure 36.

[106] *See, e.g.*, People v. Martin, 290 P.2d 855, 857 (Cal. 1955) (adopting the "vicarious exclusionary rule," under which a defendant could assert the privacy interests of third persons to bar the introduction of otherwise relevant evidence); Kaplan v. Superior Ct., 491 P.2d 1, 7–8 (Cal. 1971) (reaffirming *Martin*); People v. Brisendine, 531 P.2d 1099, 1104, 1109, 1113, 1115 (Cal. 1975) (limiting circumstances under which a full body search may be conducted following a custodial arrest); People v. Longwill, 538 P.2d 753, 754–55, 758–59, 758 n.4 (Cal. 1975) (extending full body search protection to arrestees for public intoxication and preferring the application of state constitutional protections rather than comparable federal protections); People v. Zelinski, 594 P.2d 1000, 1005–07 (Cal. 1979) (excluding evidence seized by private security guards).

state courts from giving the state exclusionary rule (regarding illegally obtained evidence) any broader scope than the federal exclusionary rule, as interpreted by the Supreme Court. Article I, section 28(d) (now article I, section 28(f)(2)) provides in relevant part that "[e]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding."[107] In *In re Lance W.*,[108] the California Supreme Court held that Proposition 8 "eliminate[d] a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."[109] Accordingly, the court held that section 28(d) properly must be interpreted "to permit exclusion of relevant, but unlawfully obtained evidence, only if exclusion is required by the United States Constitution."[110] The California Supreme Court concluded that

> Proposition 8 has abrogated both the "vicarious exclusionary rule" under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person, and a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal, Constitution.[111]

The court also rejected the argument that Proposition 8 constituted an impermissible revision, as opposed to an amendment, to the California Constitution.[112]

2. Florida

In a series of cases decided before 1983, the Florida Supreme Court interpreted the search and seizure provision of the Florida Constitution (article I, section 12) to provide greater protection against illegal searches and seizures than does the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court.[113] On November 2, 1982, the people of Florida

[107] CAL. CONST. art. I, § 28(f)(2).
[108] 694 P.2d 744 (Cal. 1985).
[109] *Id.* at 752.
[110] *Id.* at 755.
[111] *Id.* at 747.
[112] *Id.* at 755.
[113] *See, e.g.*, Grubbs v. State, 373 So. 2d 905, 909–10 (Fla. 1979) (prohibiting a probation order from obligating a probationer's consent to a warrantless search); State

approved a legislatively-proposed measure (Amendment 2) that amended article I, section 12 to conform its interpretation to the United States Supreme Court's interpretation of the Fourth Amendment, including determining when the exclusionary rule applies.[114] The amendment, in the words of the Florida Supreme Court, "unquestionably alters a substantive right."[115] Notwithstanding its scope, Amendment 2 "merely restrict[s] the authority of the Florida courts to interpret and apply the right guaranteed by Article I, Section 12 of the Florida Constitution—*which, clearly, the state has the constitutional authority to accomplish*."[116]

SUMMARY: PART I

As the foregoing list of cases demonstrates, nothing in the constitution of any state precludes the people of that state from overturning (at least prospectively) a decision of a state court interpreting the state constitution. The people, acting indirectly through their state legislature or directly through a citizen initiative (where such initiatives are allowed), may adopt such an amendment, even though the amendment limits the scope of (or even eliminates) a state constitutional right as interpreted by a state court. A state constitutional amendment that complies with all legal requirements for its submission to the voters cannot be challenged on state constitutional grounds, as one commentator recognized in summarizing the case law:

> [I]t seems clear that in the case of a proposed [state] constitutional amendment, the attack upon [its constitutionality] must be under the federal Constitution or a federal statute or treaty before the problem under examination can possibly be reached. It is impossible to perceive how a proposed amendment to a state constitution, if validly submitted and adopted, could be invalid under the

---

v. Dodd, 419 So. 2d 333, 334–35 (Fla. 1982) (applying the exclusionary rule to probation revocation proceedings under the Florida Constitution); State v. Sarmiento, 397 So. 2d 643, 645 (Fla. 1981) (restricting warrantless electronic monitoring by state agents of a conversation between the accused and an undercover police officer as an unreasonable interception of defendant's private communications); Odom v. State, 403 So. 2d 936, 940 (Fla. 1981) (applying *Sarmiento* and holding that the federal constitutional protections are not considered when interpreting the state constitution).

[114] FLA. CONST. art. I, § 12.

[115] State v. Lavazzoli, 434 So. 2d 321, 323–24 (Fla. 1983) (holding that the amendment applied only prospectively from its effective date of January 4, 1983).

[116] State v. Small, 483 So. 2d 783, 787 (Fla. Dist. Ct. App. 1986) (emphasis added).

> provisions of the constitution which it is designed to amend.[117]

Of course, an amendment to a state constitution is subject to federal constitutional review. Thus, in the event a state constitutional amendment conflicts with the federal Constitution (*e.g.*, state constitutional amendments restricting marriage to opposite-sex couples),[118] the former must yield to the latter under the Supremacy Clause.[119] Nevertheless, nothing in the United States Constitution requires any state to recognize, *as a matter of state constitutional law*, rights that the Supreme Court has recognized under the federal Constitution. This is the subject of Part II of this Article.

II. FEDERAL FLOORS AND STATE CEILINGS

It is a common metaphor of many state court opinions that, with respect to analogous state and federal constitutional provisions, the federal Constitution provides a "floor" of individual rights, while state constitutions provide a "ceiling."[120] This means that although a state constitution *may* provide a broader scope to the state analogues of federal constitutional guarantees, it may *never* provide a narrower scope. But, as then Judge Cardozo once cautioned, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[121] And that has proved to be the case

---

[117] F.G. Madara, Annotation, *Injunctive Relief Against Submission of Constitutional Amendment, Statute, Municipal Charter, or Municipal Ordinance, on Ground That Proposed Action Would Be Unconstitutional*, 19 A.L.R.2d § 1 (1951).

[118] *See supra* notes 78, 82, 102.

[119] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[120] State v. Purcell, 203 A.3d 542, 556 (Conn. 2019); Hall v. State, 788 A.2d 118, 123 (Del. 2001); Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992); Brown v. State, 62 N.E.3d 1232, 1236–37 (Ind. Ct. App. 2016); State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016); Ballou v. Enter. Mining Co., 512 S.W.3d 724, 729 n.1 (Ky. 2017); Crawford v. State, 192 So. 3d 905, 936 (Miss. 2015); State v. Eckel, 888 A.2d 1266, 1276 (N.J. 2006); State v. Ringquist, 433 N.W.2d 207, 219 (N.D. 1988) (Levine, J., concurring in part); Arnold v. City of Cleveland, 616 N.E.2d 163, 169 (Ohio 1993); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 789 (Okla. 1989) (Kauger, J., concurring in part); State v. Forrester, 541 S.E.2d 837, 840 (S.C. 2001); LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986); State v. Sieyes, 225 P.3d 995, 1003 (Wash. 2010).

[121] Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926); *see also* Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 50 (1992) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)) ("However useful that floor-ceiling metaphor

with the "federal floor/state ceiling" metaphor for state constitutional analysis, as Professor Earl Maltz has explained:

> The image of federal constitutional law as a "floor" in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not adopt state constitutional rules which fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher "ceiling" of rights for individuals. . . .
>
> Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court; the Supremacy Clause of the Federal Constitution clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail.
>
> . . . .
>
> . . . [S]uch courts [*i.e.*, those state courts which do not follow the lockstep analysis[122]] must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor," the state court is allowing a federal governmental body—the United States Supreme Court—to define, at least in part, rights guaranteed by the

---

may be, it obscures the larger truth that the level of protection of rights under state constitutions can be the same as, higher than, or lower than that provided by the federal constitution. 'The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.'").

[122] Under "lockstep" analysis, a state court interprets a provision of a state constitution consistently with the interpretation the Supreme Court has given the analogous provision of the federal constitution, neither narrower nor broader in scope. *See* People v. Caballes, 851 N.E.2d 26, 42–43 (Ill. 2006) (explaining how, when performing a lockstep analysis, a state court relies on the understood interpretation of the federal Constitution when trying to interpret the state's own constitution).

> state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federally recognized rights as a matter of state law must employ a two-stage process. The court first must determine whether the federally recognized rights themselves are incorporated into the state constitution and *only then* must determine whether those protections are more expansive under state law.[123]

Other commentators have also recognized that "[i]ndependent interpretation, as a matter of constitutional principle, must be a two-way street."[124]

> [T]here is no constitutional impediment preventing state courts from granting a lesser degree of protection under state law, *provided* only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court. In other words, the logic of principled interpretation at the state level . . . demands that any given argument be tested on its own merits independently of what level of constitutional protection could result. In some instances, it may well be that the logical scope of a state constitutional premise does not extend so far as to afford an equivalent or greater measure of protection than that allotted under the Bill of Rights.
>
> . . . Considerations of text, logic, history and consistency may prompt [state] judges to reject [certain] federally protected "rights," but only as questions of state law. These federal "rights" would not suffer in that the same state judges would then have to yield to the dictates of federal law and acknowledge the claims presented. Accordingly, the constitutional premises upon which the state law is grounded

[123] Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 443–44, 449 (1988). Professor Maltz was responding to Justice Brennan's call for state courts to be more active in extending state constitutional rights beyond how the Supreme Court has construed analogous rights in the federal Constitution. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (exhorting state courts to construe their constitutions to protect those liberties recognized by the Supreme Court and to the same degree); Maltz, *supra*, at 443 (arguing that Justice Brennan's activist advocacy does not comport with legitimate state constitutional analysis).

[124] Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 10 (1981).

> would not be sacrificed merely because federal decisional law pointed in another direction.[125]

As the late Hans Linde, a well-known proponent of independent state constitutional analysis in both his judicial and extrajudicial work, explained,

> The right question is not whether a state's guarantee is the same or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law may be less protective. In that case, the court must go on to decide the claim under federal law, assuming it has been raised.[126]

The author of the leading text on state constitutional law agrees:

> Using independent interpretation, a court might reach the same or a different result than the federal one, using the same or different standards or theories. An independent opinion may even conclude that a state provision is "less" protective than the federal counterpart is perceived to be. The state court must then reach any federal fourteenth amendment challenges to the alleged deprivation.[127]

State reviewing courts are increasingly recognizing that, under an independent state constitutional analysis, as opposed to "lockstep"

---

[125] *Id.* at 15–16.

[126] Linde, *supra* note 121, at 179; *see also* Massachusetts v. Upton, 466 U.S. 727, 736, 738–39 (1984) (Stevens, J., concurring) (agreeing with Linde that a state constitutional provision may be less protective than its federal counterpart).

[127] 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 44–45 (4th ed. 2006); *see, e.g.*, Sanders v. State, 585 A.2d 117, 146 n.25 (Del. 1990) ("Since the Delaware Constitution is an organic body of law, there is no reason why it cannot be interpreted to provide *fewer* protections than the Federal Constitution. Of course, insofar as the Federal Constitution is more expansive, it must override contrary state law."); State v. Briggs, 199 P.3d 935, 942 (Utah 2008) (recognizing that state law may "provide a lesser level of protection" than federal law, in which case the court must address the federal claim, if raised); State v. Schwartz, 689 N.W.2d 430, 438 (S.D. 2004) (Konenkamp, J., concurring in result) ("At a minimum, citizens have the rights guaranteed by the federal provisions, but some of our state constitutional guarantees might afford only equal or less protection than the Federal Constitution."); Alva State Bank & Tr. Co. v. Dayton, 755 P.2d 635, 638 (Okla. 1988) (Kauger, J., specially concurring) (recognizing that if the state constitution provides less protection than federal law, then "the question must be determined by federal law").

analysis, *federal* constitutional rights are not necessarily incorporated into *state* constitutions. In *Ex parte Tucci*,[128] the Texas Supreme Court recognized the distinction between independent state constitutional analysis and the command of the Supremacy Clause:

> When both federal and state constitutional claims are raised, a state court may not, under the supremacy clause, U.S. Const. art. VI, cl. 2, afford less protection to individual rights than that guaranteed by our national Bill of Rights. In that sense, the prior writings of this court are fully accurate regarding a "federal safety net"—a floor for our liberties and a potentially higher state ceiling. *It is also true that an independent state judiciary may interpret its fundamental law as affording less protection than our federal charter*.[129]

As the Michigan Supreme Court has explained,

> Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution. It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the [federal] constitution.[130]

The Court continued, "[A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same."[131]

In *Hulit v. State*,[132] the Texas Court of Criminal Appeals rejected the floor-ceiling metaphor as misleading and inaccurate. The court explained:

> The state constitution and the federal constitution are not parts of one legal building; each is its own structure. Their shapes may be different, as may their parts. Each may shield

128 859 S.W.2d 1 (Tex. 1993).
129 *Id.* at 13 (plurality opinion) (emphasis added).
130 Sitz v. Dep't of State Police, 506 N.W.2d 209, 216–17 (Mich. 1993).
131 *Id.* at 217.
132 982 S.W.2d 431 (Tex. Crim. App. 1998).

> rights that the other does not. The ceiling of one may be lower than the floor of the other. Because of the Supremacy Clause of the United States Constitution, a defendant who is entitled to claim [] the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution.[133]

The Indiana Court of Appeals has said, "Indiana courts have the obligation to determine whether an act is protected by the Indiana Constitution, independently of whether the act is protected by federal constitutional guarantees."[134] Accordingly, "The protections provided by the Indiana Constitution may be more extensive than those provided by its federal constitutional counterparts. Those protections may be less extensive; or they may be coterminous."[135] Other state courts are in accord with these views.[136]

It is not at all unusual for state constitutions to be less protective of certain rights than the federal Constitution. There are many examples of this. First, the free speech and free press guarantees of nineteen state constitutions expressly provide that truth is not a defense in a civil action or a criminal prosecution for libel unless the libelous statements were made with "good motives" and for "justifiable

---

[133] *Id.* at 437; *see also* Malyon v. Pierce Cnty., 935 P.2d 1272, 1281 & n.30 (Wash. 1997) (articulating the different roles and functions of the federal Constitution and the state constitution).

[134] Taylor v. State, 639 N.E.2d 1052, 1053–54 (Ind. Ct. App. 1994).

[135] *Id.* at 1053 (citations omitted). "Questions arising under the Indiana Constitution are to be resolved by examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our Constitution, and case law interpreting the specific provisions." Ratliff v. Cohn, 693 N.E.2d 530, 534 (Ind. 1998) (quoting Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996)) (internal quotation marks omitted).

[136] *See, e.g.*, Serna v. Superior Ct., 707 P.2d 793, 799–800 (Cal. 1985) (deciding that, as previously construed by the state supreme court, the state constitutional standard was less exacting than the Sixth Amendment right to a speedy trial); State v. Oliver, 372 S.E.2d 256, 259 (Ga. Ct. App. 1988) ("If anything, the Georgia Constitution is less protective than the Fifth Amendment, for it recognizes an exception to bar against double jeopardy when the first trial ends in mistrial."); State v. Jackson, 503 S.E.2d 101, 103 (N.C. 1998) ("Strictly speaking . . . a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision."); West v. Thomson Newspapers, 872 P.2d 999, 1004 n.4 (Utah 1994) ("The scope of state constitutional protection for expression may be broader or narrower than the federal, depending on the state constitution's language, history, and interpretation."); State v. Brown, 930 N.W.2d 840, 857 (Iowa 2019) (McDonald, J., specially concurring) ("This court is free to interpret our constitution to provide less or more protection than the Federal Constitution.").

ends."[137] The Supreme Court, however, has made it clear, at least with respect to libel of public officials and public figures, that truth is a complete defense in a criminal libel prosecution, regardless of the defendant's motives or purposes in making the libelous statements,[138] and that, in a civil libel action, the defendant's "good motives" are irrelevant to the determination of liability.[139] Second, the "Second Amendment" guarantees of several state constitutions have been interpreted by their state courts to confer only a collective right, not an individual right.[140] But the Supreme Court has held that the right to keep and bear arms protected by the Second Amendment, as applied to the states, confers an individual, not a collective, right.[141] Third, several state supreme courts have held that state statutes forbidding the teaching of any secular subject in a foreign language or requiring the education of Amish school-age children beyond elementary school did not violate their state constitutional guarantees of free exercise of

---

137 ARK. CONST. art. II, § 6; FLA. CONST. art. I, § 4 (referring only to "good motives," not "justifiable ends"); ILL. CONST. art. I, § 4; IOWA CONST. art. I, § 7; MISS. CONST. art. 3, § 13; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.D. CONST. art. I, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; R.I. CONST. art. I, § 20 (stating that truth is a defense "unless published from malicious motives," without mentioning "good motives" or "justifiable ends"); S.D. CONST. art. VI, § 5; UTAH CONST. art. I, § 15; W. VA. CONST. art. III, § 8; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20 (using "good intent" instead of "good motives").

138 *See* Garrison v. Louisiana, 379 U.S. 64, 72–75 (1964) (holding that the truth defense promulgated by the Court in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), is equally as applicable in excusing criminal liability for the libel of a public official).

139 *See N.Y. Times*, 376 U.S. at 267, 279–80 (describing standard that, in a civil action for libel against a public official, the plaintiff must prove that the libelous statement was false and that the defendant knew that it was false or said it with a reckless disregard for its truth or falsity); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154–55 (1967) (imposing the same standard with respect to public figures).

140 *See* City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905) (interpreting Kansas Constitution, Bill of Rights section 4, prior to its amendment in 2010); Commonwealth v. Davis, 343 N.E.2d 847, 848–49 (Mass. 1976) (interpreting MASS. CONST. pt. 1, art. XVII); Chief of Police v. Moyer, 453 N.E.2d 461, 464 (Mass. App. Ct. 1983) (citing and following *Davis*); Dupont v. Chief of Police, 786 N.E.2d 396, 399–400 (Mass. App. Ct. 2003) (citing both *Davis* and *Moyer*); Commonwealth v. Runyan, 922 N.E.2d 794, 798 n.5 (Mass. 2010) (maintaining *Davis*'s interpretation); Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266, 269, 272–73 (Ill. 1984) (holding that any individual right to "keep and bear arms" protected by Illinois Constitution article I, section 22 does not include the right to keep handguns in the home). *But see* State v. Mendoza, 920 P.2d 357, 367 (Haw. 1996) (declining to decide whether HAW. CONST. art. I, § 17, confers an individual right to keep and bear arms).

141 *See* District of Columbia v. Heller, 554 U.S. 570, 592, 595, 625 (2008) (establishing that the Second Amendment secures an individual right to keep and bear arms); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (incorporating the Second Amendment's individual right to the states through the Fourteenth Amendment).

religion (or other provisions of their state constitutions).[142] The Supreme Court, however, has held that such statutes do violate the federal Constitution.[143] Nor is it unusual for a state constitution not to protect at all a right protected by the federal Constitution. The constitutions of six states—California, Iowa, Maryland, Minnesota, New Jersey, and New York—do not protect any right to keep and bear arms, even a collective right, even though the Second Amendment has been construed to guarantee an individual right to keep and bear arms.[144] The constitutions of Indiana and Oregon do not include an explicit guarantee of due process of law, nor have any of their provisions been construed to guarantee due process by implication,[145] even though the Due Process Clause of the Fourteenth Amendment applies to Indiana and Oregon, like all other states. The constitution of Alabama has been construed by its supreme court not to require equal protection of the laws,[146] even though the Equal Protection

---

[142] Meyer v. State, 187 N.W. 100, 102–03 (Neb. 1922) (allowing the prohibition of foreign language education), *rev'd*, 262 U.S. 390, 402–03 (1923); State v. Bartels, 181 N.W. 508, 513–14 (Iowa 1921) (finding that foreign language prohibitions do not limit the free exercise of religion), *rev'd*, 262 U.S. 404, 409, 411 (1923); Pohl v. State, 132 N.E. 20, 21–22 (Ohio 1921) (holding that prohibiting foreign language instruction was in accordance with the common welfare of the state), *rev'd sub nom.* Iowa v. Bartels, 262 U.S. 404, 409–11 (1923); State v. Garber, 419 P.2d 896, 900–02 (Kan. 1966) (holding that religious freedom protections do not exclude Amish children from mandatory education statutes); State v. Hershberger, 144 N.E.2d 693, 697 (Ohio Ct. App. 1955) (holding that mandatory education for children does not prevent anyone from holding particular religious beliefs and that equivalent private education sufficiently protects such interests); Commonwealth v. Beiler, 79 A.2d 134, 137 (Pa. Super. Ct. 1951) (holding that the constitutional religious freedom protections do not extend to conduct such as removing children from state-sanctioned education).

[143] *See* Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923) (ruling unconstitutional laws that prohibited foreign language education); Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972) (ruling unconstitutional laws that mandated school attendance for Amish children).

[144] *See supra* note 141 and accompanying text. *See generally* CAL. CONST. art. I, §§ 1–32 (excluding any rights regarding arms in the California Constitution); IOWA CONST. art. I, §§ 1–25 (excluding any rights regarding arms in the Iowa Constitution); MD. CONST. Declaration of Rights, arts. I–XLVII (excluding any rights regarding arms in the Maryland Constitution); MINN. CONST. art. I, §§ 1–17 (excluding any rights regarding arms in the Minnesota Constitution); N.J. CONST. art. I, §§ 1–21 (excluding any rights regarding arms in the New Jersey Constitution); N.Y. CONST. art. I, §§ 1–18 (excluding any rights regarding arms in the New York Constitution).

[145] *See* McIntosh v. Melroe Co., 729 N.E.2d 972, 976 (Ind. 2000) (citing IND. CONST. art. I, § 12) (limiting the scope of the state "remedy by due course of law" guarantee); Cole v. State, 655 P.2d 171, 173 (Or. 1982) (citing OR. CONST. art. I, § 10) (holding that Oregon's state "remedy by due course of law" guarantee "is neither in text nor in historical function the equivalent of a due process clause").

[146] *See Ex parte* Melof, 735 So. 2d 1172, 1186 (Ala. 1999) (holding that even though the Alabama Constitution had been interpreted to provide equal protection like the federal Constitution in the past, its language does not support that conclusion); Squires

Clause of the Fourteenth Amendment applies to Alabama and every other state. An understanding of the proper relationship between state and federal constitutional analysis, with respect to state courts that interpret provisions of their state constitutions independently of analogous provisions of the federal Constitution, leads to but one conclusion: a right protected by the federal Constitution does *not* require a state court, *as a matter of state law*, to extend protection to the same right. This conclusion should hold true for analysis of abortion rights, as it does of other asserted rights.[147]

In a decision rejecting a state constitutional challenge to Ohio's informed-consent abortion statute, the Ohio Court of Appeals noted that although a state court is "not free to find constitutional a statute that violates the United States Constitution, as interpreted by *Planned Parenthood* on the basis that the [state] [c]onstitution is not violated," it need not "follow the undue-burden test of *Planned Parenthood* [in construing] the [state] [c]onstitution."[148] "Instead, the state may use either a lesser or greater standard."[149] In a similar vein, the Massachusetts Supreme Judicial Court, in interpreting the Massachusetts Constitution, refused to employ the Supreme Court's (now abandoned) "rigid formulation" of balancing the interests at stake in the abortion debate, preferring instead a "more flexible approach to the weighing of interests that must take place."[150] Finally, both the Mississippi Supreme Court and the Michigan Court of Appeals have conducted independent analyses of their state constitutions, the former concluding, without reference to Supreme Court precedent, that the

v. City of Saraland, 960 So. 2d 666, 667 n.1 (Ala. Civ. App. 2007) (citing *Melof*, 735 So. 2d at 1205) ("There is, in actuality, no guarantee of equal protection enumerated in the Alabama Constitution . . . .").

[147] Presumably, state courts that apply "lockstep" analysis to their state due process (or equivalent) guarantees would recognize a *state* right to abortion so long as the Supreme Court continues to recognize a *federal* right to abortion, but not if *Roe v. Wade* were overruled. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (holding that there is a federal right to abortion), *modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992); Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 758, 760 (Ill. 2013) (applying lockstep analysis in a state constitutional challenge to a parental notice statute). Courts employing this mode of analysis would not recognize a right to abortion that is separate from, and independent of, the right recognized in *Roe*.

[148] Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 577–78, 577 n.9, 584 (Ohio Ct. App. 1993).

[149] *Id.* at 575 n.5.

[150] Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390, 402–04 (Mass. 1981) (striking down restrictions on public funding of abortion); *see also* Planned Parenthood League of Mass., Inc. v. Att'y Gen., 677 N.E.2d 101, 103 (Mass. 1997) (upholding a parental consent statute, but limiting statute to one-parent consent).

Mississippi Constitution confers a state right to abortion,[151] and the latter concluding otherwise under the Michigan Constitution.[152]

SUMMARY: PART II

In sum, depending on text, history, and interpretation, a state court may reasonably and legitimately either follow Supreme Court precedent construing a federal constitutional guarantee in construing a similar guarantee in the state constitution, with all the limitations that implies, or it may construe the state constitution independently of the federal Constitution. In either event, the people of a given state, by amending their constitution, may reject a state court interpretation of their constitution with which they disagree. And that includes an interpretation recognizing a state constitutional right to abortion. What amendments relating to abortion should states consider? That is the subject of Part III of this Article.

III. DRAFTING STATE CONSTITUTIONAL AMENDMENTS ON ABORTION

In determining whether a state constitutional amendment on abortion should be proposed in a given state, the first question that needs to be asked is whether the amendment is necessary, either to overturn an existing state court ruling recognizing a state constitutional right to abortion or mandating public funding of abortion, or to prevent such a ruling in the future. In the case of overturning a state court decision, the need is most pressing, but in many of those states, an amendment could never be proposed, or if proposed, approved by the voters.[153] In other states, there may be reasonable grounds for believing that, if presented with the opportunity, the state supreme court would recognize a state right to abortion (or abortion funding). Even in states where no court decision recognizing a state right to abortion (or abortion funding) has been made or is likely to be made, an amendment to prevent such a contingency from occurring may be appropriate. It would be difficult to exaggerate the pressure state courts would be under to recognize a state right to abortion after *Roe v. Wade* is overruled. And it would be easier to propose and pass a state constitutional amendment on abortion before that occurs.

The second question that needs to be answered regarding a state constitutional amendment is whether, given the political climate in a particular state, there is enough support in the legislature (or among

[151] Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653–54 (Miss. 1998).
[152] Mahaffey v. Att'y Gen., 564 N.W.2d 104, 111 (Mich. Ct. App. 1997).
[153] *See supra* notes 14–16 and accompanying text.

the public, in states where citizen initiatives are permitted) to put an amendment on the ballot and, if so, whether it is likely that the public would approve the amendment that is proposed. Answering this question calls for a thoughtful assessment of the politics of the state in question.

The third question that needs to be answered is: what kind of amendment should be proposed? In drafting an amendment, one should consider carefully what amendments have passed in other states and what amendments have failed. Of course, that must not overlook the political climate in a given state, as noted above. Nevertheless, it may be said that amendments that do no more than neutralize the state constitution as a source of abortion rights have fared far better at the polls than amendments that would go farther and confer legal status ("personhood") on the unborn child. With the exception of Florida's Amendment 6 in November 2012[154] and Massachusetts's Question 1 in 1986,[155] every abortion neutrality amendment that has been proposed to date has been approved by the voters.[156] And the prospects for passing the neutrality amendments that have been proposed in Iowa, Kansas, and Kentucky look promising. In sharp contrast, every state constitutional amendment that would have conferred legal status on unborn children (or would

---

[154] See *supra* note 16 for a description of Amendment 6.

[155] Question 1, a legislatively-referred amendment, would have added the following language to the Massachusetts Constitution:

> No provision of the Constitution shall prevent the General Court [the Massachusetts legislature] from regulating or prohibiting abortion unless prohibited by the United States Constitution, nor shall any provision of the Constitution require public or private funding of abortion, or the provision of services or facilities therefor, beyond that required by the United States Constitution.
>
> The provisions of this article shall not apply to abortions required to prevent the death of the mother.

MASS. SEC'Y OF STATE, MASSACHUSETTS INFORMATION FOR VOTERS: THE BALLOT QUESTIONS IN 1986, at 17 (1986).

[156] *See supra* notes 2–7 (including the text of the amendments in Alabama, Arkansas, Louisiana, Tennessee, West Virginia, and Rhode Island).

have otherwise prohibited abortion) has failed—in Arizona in 1992;[157] Colorado in 2008,[158]

---

[157] Proposition 110, a citizen-initiated measure, was defeated on November 3, 1992, by a vote of 68.54% "No" to 31.46% "Yes." *Arizona Initiative to Ban Abortion, Proposition 110 (1992),* BALLOTPEDIA, https://ballotpedia.org/Arizona_Initiative_to_Ban_Abortion,_Proposition_110_(1992) (last visited Feb. 9, 2022). If approved, Proposition 110 would have added the following language to the Arizona Constitution:

> Section 1. No public funds shall be used to pay for an abortion, except when that procedure is necessary to save the life of the mother.
>
> Section 2. No preborn child shall be knowingly deprived of life at any stage of biological development by any person except to save the life of the mother. However, the Legislature shall provide for exceptions only in those circumstances where pregnancy results from an act of either reported sexual assault or reported incest.
>
> Section 3. This amendment shall not subject any woman to criminal prosecution or civil liability for undergoing an abortion.
>
> Section 4. Any court of competent jurisdiction, upon request, shall appoint a licensed attorney as a special guardian to represent preborn children, as a class, for the purpose of protecting their rights under this amendment from deprivation by any person.
>
> Section 5. This amendment shall not affect contraceptives or require an appropriation of public funds.

ARIZ. SEC'Y OF STATE, STATE OF ARIZONA: GENERAL ELECTION NOVEMBER 3, 1992, at 61 (1992).

[158] Amendment 48 (also called Initiative 36 before its appearance on the Colorado ballot), a citizen-initiated measure, was defeated on November 4, 2008, by a vote of 73.21% "No" to 26.79% "Yes." *Colorado Definition of Person, Initiative 48 (2008)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Definition_of_Person,_Initiative_48_(2008) (last visited Feb. 7, 2022). If approved, Amendment 48 would have added a new section to the Colorado Declaration of Rights (article II, section 32) to define the word "person" and "persons," as used in sections 3, 6 and 25 of the Declaration of Rights to "include any human being from the moment of fertilization." COLO. SEC'Y OF STATE, FINAL PROPOSED INITIATIVE 36 (2007).

2010,[159] and 2014;[160] Mississippi in 2011;[161]

---

[159] Amendment 62 (also called Initiative 25 before its appearance on the Colorado ballot), a citizen-initiated measure, was defeated on November 2, 2010, by a vote of 70.53% "No" to 29.47% "Yes." *Colorado Fetal Personhood, Initiative 62 (2010)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Fetal_Personhood,_Initiative_62_(2010) (last visited Feb. 10, 2022). If approved, Amendment 62 would have added a new section to the Colorado Declaration of Rights (article II, section 32) to define the word "person" and "persons," as used in sections 3, 6, and 25 of the Declaration of Rights, to "apply to every human being from the beginning of the biological development of that human being." COLO. SEC'Y OF STATE, FINAL PROPOSED INITIATIVE 25 (2009).

[160] Amendment 67, a citizen-initiated measure, was defeated on November 4, 2014, by a vote of 64.87% "No" to 35.13% "Yes." *Colorado Definition of "Personhood" Initiative, Amendment 67 (2014)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Definition_of_%22Personhood%22_Initiative,_Amendment_67_(2014) (last visited Feb. 7, 2022). If approved, Amendment 67 would have added the following section to the "Miscellaneous" article of the Colorado Constitution (article XVIII, section 17):

> 1. Purpose and findings. In 2009, Judges of the Colorado State Court of Appeals in People [v.] Lage 232 P.3d 138 (Colo. App. 2009) concluded that:
>
> (a) "There is no definition of 'person' or 'child' of general applicability in the Criminal Code" (majority opinion by Judge Roy); and
>
> (b) "This is an area that cries out for new legislation. Our General Assembly, unlike congress and most state legislatures, has precluded homicide prosecutions for killing the unborn" (Judge Connelly concurring in part and dissenting in part).
>
> 2. Definitions. In the interest of the protection of pregnant mothers and their unborn children from criminal offenses and neglect and wrongful acts, the words "person" and "child" in the Colorado Criminal Code and the Colorado Wrongful Death Act must include unborn human beings.
>
> 3. Self executing, and severability provision. All provisions of this section are self-executing and are severable.
>
> 4. Effective date. All provisions of this section shall become effective upon official declaration of the vote hereon by proclamation of the governor pursuant to section 1(4) of Article V.

COLO. SEC'Y OF STATE, AMENDMENT 67: DEFINITION OF PERSON AND CHILD–FINAL TEXT (2013), https://www.coloradosos.gov/pubs/elections/Initiatives/ballot/contacts/2014.html.

[161] Initiative 26, an indirect citizen initiative (requiring legislative approval) was defeated on November 8, 2011, by a vote of 57.63% "No" to 42.37% "Yes." *Mississippi Life Begins at the Moment of Fertilization Amendment, Initiative 26 (2011)*, BALLOTPEDIA, https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment,_Initiative_26_(2011) (last visited Feb. 7, 2022). Initiative 26, if approved, would have added a new section to the Mississippi Declaration of Rights (article III, section 33), providing that "[a]s used in . . . Article III . . . [t]he term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning or the functional equivalent thereof." MISS. SEC'Y OF STATE, INITIATIVE INFORMATION: DEFINITION OF "PERSON", https://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?IId=26.

North Dakota in 2014;[162] Oregon in 1990;[163] and Rhode Island in 1986.[164] The overwhelming defeat of Initiative 26 in Mississippi in 2011 is particularly noteworthy because Mississippi is probably the most conservative state in the country.[165] The lesson to be learned from these experiences is that one must not overreach. Apart from

---

[162] Measure 1, a legislatively-referred amendment, was defeated on November 4, 2014, by a vote of 64.13% "No" to 35.87% "Yes." *North Dakota "Life Begins at Conception" Amendment, Measure 1 (2014)*, BALLOTPEDIA, https://ballotpedia.org/North_Dakota_%22Life_Begins_at_Conception%22_Amendment,_Measure_1_(2014) (last visited Feb. 7, 2022). Measure 1, if approved, would have added a new section to the North Dakota Declaration of Rights providing that "[t]he inalienable right to life of every human being at any stage of development must be recognized and protected." N.D. S. Con. Res. 4009 (N.D. 2013).

[163] Measure No. 8, a citizen-initiated measure, was defeated on November 6, 1990, by a vote of 67.74% "No" to 32.26% "Yes." *Oregon Prohibition of Abortion and Exceptions, Measure 8 (1990)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Prohibition_of_Abortion_and_Exceptions,_Measure_8_(1990) (last visited Feb. 7, 2022). Measure No. 8, if approved, would have added a new section to the Oregon Declaration of Rights (article I, section 41), providing that "[n]otwithstanding any provision of this Constitution, abortion is prohibited except to prevent the death of the mother and in reported cases of rape and incest." OR. SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 6, 1990, at 64 (1990).

[164] Rhode Island adopted a new constitution on November 4, 1986 (article I, section 2), which includes abortion neutrality language. See *supra* note 7 for the text of article I, section 2. The drafters of the 1986 Rhode Island Constitution submitted separate proposals to the voters considering the new constitution, one of which (Constitutional Amendment 14) would have amended the Rhode Island Constitution to include a new article (article XVI), prohibiting abortion to the extent permitted by the United States Constitution, except to prevent the death of the mother, and also prohibiting public funding of abortion. R.I. SEC'Y OF STATE, BALLOT QUESTION NO. 14: PARAMOUNT RIGHT TO LIFE/ABORTION (1986). The proposed amendment was defeated by a vote of 64.40% "No" to 35.60% "Yes." *Rhode Island Paramount Right to Life, Constitutional Amendment 14 (1986)*, BALLOTPEDIA, https://ballotpedia.org/Rhode_Island_Paramount_Right_to_Life,_Constitutional_Amendment_14_(1986) (last visited Feb. 10, 2022).

[165] In view of the defeat of Initiative 26 in 2011, Mississippi should consider an abortion neutrality amendment that would overturn the decision of the Mississippi Supreme Court recognizing a state right to abortion. *See* Pro-Choice Miss. v. Fordice, 716 So. 2d 645, 653–54 (Miss. 1998) (following the United States Supreme Court in interpreting the Mississippi Constitution's right to privacy to include the right to an abortion). Mississippi could also consider adopting the approach of Arkansas' Amendment 68, adopted in 1988, which is neither a neutrality amendment nor a "personhood" amendment. See *supra* note 3 for the text of the amendment. Section 1 of the amendment prohibits the use of public funds "to pay for any abortion, except to save the mother's life," and Section 2 states that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." ARK. CONST. amend. 68, § 2. Unlike the "personhood" amendments that have been proposed (and uniformly rejected), nothing in Amendment 68, Section 2 purports to confer legal personhood on unborn children and the expression of public policy "to protect the life of every unborn child from conception until birth" was expressly made subject to federal constitutional constraints. *Id.*

restricting public funding of abortion,[166] voters do not approve of using constitutional amendments to establish abortion policy, while they generally do approve of using constitutional amendments to allow their

---

[166] Even this statement must be qualified. While both Arkansas and Colorado have approved state constitutional amendments prohibiting public funding of abortion except to save the mother's life, *see supra* notes 3 (Arkansas), 8 (Colorado), the voters of Oregon rejected such an amendment on November 6, 2018, by a vote of 64.48% "No" to 35.52% "Yes." *Oregon Measure 106, Ban Public Funds for Abortions Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Measure_106,_Ban_Public_Funds_for_Abortions_Initiative_(2018) (last visited Feb. 10, 2022). Measure No. 106, if approved, would have provided as follows:

> SECTION 1. PROHIBITION ON PUBLIC FUNDING FOR ABORTIONS.
>
> The state shall not spend public funds for any abortion, except when medically necessary or as may be required by federal law.
>
> SECTION 2. DEFINITIONS.
>
> As used in this Article:
>
> (1) "Public funds" means funds and moneys under the control or in the custody of the State of Oregon or any of its political subdivisions or public officials.
>
> (2) "Abortion" means the purposeful termination of a clinically diagnosed pregnancy of a woman resulting in the death of the human embryo or fetus.
>
> (3) "Medically necessary" means a condition in which a licensed physician determines that the pregnant woman suffers from a physical disorder, physical injury, or physical illness that would place her in danger of death unless an abortion is performed, including a life-endangering physical condition caused by or arising from the pregnancy itself.
>
> SECTION 3. EXCEPTIONS.
>
> (1) Public funds may be spent to pay for an abortion when federal law requires states to provide funding for abortions, such as in circumstances including rape or incest, in which case this Article shall be applied consistent with federal law to the extent the federal requirement is found to be constitutional.
>
> (2) Public funds may be spent to pay for the termination of a clinically diagnosed ectopic pregnancy.
>
> SECTION 4. OTHER PROVISIONS.
>
> Nothing in this Article shall be construed as prohibiting the expenditure of public funds to pay for health insurance as long as such funds are not spent to pay or reimburse for the costs of performing abortions.

OR. SEC'Y OF STATE, MEASURE 106: STOP TAXPAYER FUNDING FOR ABORTION ACT OF 2018, http://egov.sos.state.or.us/elec/web_irr_search.main_search.

state legislatures to regulate abortion free of any state constitutional restraints. The uniform rejection of "personhood" amendments (or their equivalent), even in conservative states like Arizona, Mississippi, and North Dakota, suggests that such amendments should be avoided,[167] while the approval of neutrality amendments, not only in conservative states like Alabama, Louisiana, Tennessee, and West Virginia, but also in a politically moderate (or even liberal) state like Rhode Island, offers hope that such amendments could prevail elsewhere.[168] The pro-life movement should not lose sight of the objective here, which is to enable state legislatures to decide abortion policy free of the constraints of state constitutional limits. That includes *regulating* abortion to the extent permitted by current federal constitutional doctrine and *prohibiting* abortion once *Roe v. Wade* has been overruled. There is considerable public support to return the issue of abortion to the people, acting through their elected senators and representatives, to decide whether, and to what extent, the practice of abortion should be regulated and/or prohibited. The objective is *not* (nor should it be) to enshrine in constitutional language the public policy choices that should be made by state legislatures (other than, perhaps, restricting public funding of abortion). There is little, if any, public support to "constitutionalize" state abortion policies.[169] As to

[167] This political observation is entirely apart from the fact that recognition of the legal personality (personhood) of the unborn child, in and of itself, would not end abortion, even in an environment in which *Roe v. Wade* had been overruled. *See* Paul Benjamin Linton, *Sacred Cows, Whole Hogs & Golden Calves*, HUM. LIFE REV., Summer 2007, at 43, 47–49 (arguing that many pro-life advocates advocate personhood recognition, even though it would not actually fix the problems they find in abortion jurisprudence); Paul Benjamin Linton, *This Dog Won't Hunt: A Reply to Gregory J. Roden*, HUM. LIFE REV., Fall 2008, at 71, 71–72, 76–77 (responding to a critique of *Sacred Cows* and explaining why the recognition of personhood alone would not remedy any legal concerns about abortion); Paul Benjamin Linton, *How Not to Overturn* Roe v. Wade, FIRST THINGS (Nov. 2002), https://www.firstthings.com/article/2002/11/how-not-to-overturn-roe-v-wade (articulating the Supreme Court's lack of authority to declare the personhood of unborn children in the first place).

[168] *See* s*upra* notes 2, 4–6 (quoting the neutrality amendments of Alabama, Louisiana, Tennessee, and West Virginia, respectively). The abortion neutrality language in the Rhode Island Constitution was included in article I, section 2 of the new state constitution adopted in 1986. *See supra* note 7 (quoting the Rhode Island Constitution). Whether such language would have been approved if submitted separately to the voters is unknown.

[169] For an extreme (and unusual) example of a state constitutional amendment that would "constitutionalize" state abortion policy, see Oklahoma House Joint Resolution 1027 and Senate Joint Resolution 17. H.R.J. Res. 1027, 58th Leg., 1st Sess. (Okla. 2021); S.J. Res. 17, 58th Leg., 1st Sess. (Okla. 2021). The resolutions would have incorporated in the Oklahoma Constitution a criminal statute prohibiting abortion except when the abortion was necessary "to prevent the death of [the] pregnant woman, or to prevent substantial or irreversible physical impairment of the pregnant woman that substantially increases the risk of death." Okla. H.R.J. Res. 1027 § 2A(D)(2); Okla.

specific language, the language of abortion neutrality amendments that have been passed or have been proposed should be consulted.

SUMMARY: PART III

The considerable experience that the pro-life movement has developed over many decades in framing state constitutional amendments relating to the issue of abortion strongly suggests that "less is more." Amendments that do no more than neutralize state constitutions as a source of abortion rights (with or without language that prohibits public funding of abortion) are likely to pass (at least in states where placing such proposals on the ballot is politically feasible), and amendments that attempt to go farther and incorporate specific public policies in a state constitution are likely to fail, even in states (like Mississippi) that are thought to be very pro-life.

CONCLUSION

This Article has sought to make three points. First, nothing in any state constitution prevents the people of a given state from amending their constitution to eliminate or limit the scope of state constitutional rights, as those rights have been interpreted by the courts of that state. On a broad range of issues—from abortion to affirmative action to busing to eliminating *de facto* segregation in public schools to the death penalty to search and seizure to same-sex marriage—the people have acted, constitutionally, to overturn (prospectively) state court decisions with which they disagreed. No state court has ever questioned their authority to do so.

Second, nothing in the United States Constitution requires a state, *as a matter of state constitutional law*, to recognize the same rights that are protected by the federal Constitution. Regardless of the issue, the fact that a right is protected by the federal Constitution does not mean that it also has to be protected by state constitutions. Thus, the reflexive and unthinking metaphor of many state court decisions referring to "federal floors" and "state ceilings," meaning that a state constitution may never provide less protection to individual rights than does the federal Constitution, is simply mistaken. When a provision of

---

S.J. Res. 17 § 2A(D)(2). It is odd, to say the least, to include a criminal statute in a state constitution. Moreover, given the Oklahoma Supreme Court's track record in striking unconstitutional proposals from the ballot, it is unlikely that either joint resolution, if approved by the Oklahoma legislature, would have ever reached the ballot. *See In re* Initiative Petition No. 349, 838 P.2d 1, 12 (Okla. 1992) (striking abortion initiative from the ballot because, if adopted, it would violate the federal Constitution); *In re* Initiative Petition No. 406, 369 P.3d 1068, 1068 (Okla. 2016) (striking a similar initiative from the ballot twenty-four years later).

a state constitution conflicts with the federal Constitution, as interpreted by the Supreme Court (*e.g.*, state amendments restricting marriage to opposite-sex couples), the state constitution must yield to the command of the Supremacy Clause. But that does not mean that the state constitution must extend protection to the right secured by the federal constitution. It means only that it is unenforceable to the extent of the conflict. And nothing in the federal Constitution (or the constitution of any state) bars a state constitutional amendment that provides that the state constitution does not secure a right to abortion or the funding thereof.

Third, in considering what kind of state constitutional amendment on abortion should be proposed in a given state, pro-life legislators, organizations, and their supporters should carefully review which amendments have passed and which have failed in other states. That review strongly suggests that amendments that do no more than neutralize the state constitution as a source of abortion rights fare best, while amendments that attempt to "constitutionalize" state abortion policies have been uniformly rejected.

Appendix: Table of State Constitutional Amendments Overturning State Court Interpretations of State Declaration of Rights (or Bill of Rights) Provisions

State/Issue	Abortion	Affirmative Action	Busing	*De Facto* Segregation	Death Penalty	Same-Sex Marriage	Search & Seizure
Alaska						√	
California		√	√	√	√	√	√
Florida	√				√		√
Hawaii						√	
Mass.					√		
Michigan		√					
New Jersey					√		
Oregon						√	
Tennessee	√						
West Virg.	√						

WRONG ENOUGH TO FIX: MEASURING AND WEIGHING WRONGNESS IN *RAMOS V. LOUISIANA*

Michael G. Schietzelt[*]

TABLE OF CONTENTS

INTRODUCTION

I. TWO APPROACHES TO STARE DECISIS (AND A BONUS FRAMEWORK)

A. Stare Decisis Before Roe *and* Casey
B. Contemporary Stare Decisis
C. Justice Kavanaugh's Proposed Framework

II. MEASURING WRONGNESS

A. Ramos v. Louisiana
B. The Court's Wrongness Benchmarks in Ramos

III. WEIGHING WRONGNESS

CONCLUSION

INTRODUCTION

On December 1, 2021, the Court heard oral argument in *Dobbs v. Jackson Women's Health Organization*, one of the most anticipated cases in a generation.[1] In *Dobbs*, the State of Mississippi launched a direct attack on *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] asking the Court to recognize a state's interest in banning abortion before viability.[4] A generation of judicial debate—and popular-press handwringing—over the Court's precedent on precedent has centered around abortion. Whether the Court reaffirms,

---

[*] Michael G. Schietzelt is a Lecturer at Regent University School of Law and Constitutional Law Fellow with the Robertson Center for Constitutional Law, J.D., Duke University.

[1] Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. argued Dec. 1, 2021), https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392.

[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992).

[4] *See generally* Brief for Petitioners at 11–36, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. July 22, 2021) (presenting the stare decisis case against *Roe* and *Casey*).

overrules, or avoids *Roe* and *Casey*, stare decisis will be the defining issue of the October Term 2021.

Questions and inconsistencies riddle the Court's stare decisis doctrine. The Court often repeats the obligatory phrase: "*Stare decisis* is not an inexorable command."[5] Almost as often, the Court explains that overturning precedent requires "special justification"[6] or "strong grounds"[7] beyond the mere wrongness of the precedent. Wrongness itself is only a threshold question.[8]

But even this threshold question is ill-defined. During oral argument in *Dobbs*, the Chief Justice raised the standard by which we measure wrongness.[9] Whether a case is wrongly decided may depend upon whether we apply contemporaneous legal principles and doctrine or measure the precedent against our own understanding of constitutional interpretation. And once the Court concludes that a case is wrongly decided, how does that weigh into the calculus of whether a case should be overturned? Is wrongness alone a sufficient reason to overturn a case? Or merely a necessary predicate? The Court's precedent on precedent remains unclear on each of these points.

This Article focuses on the threshold stare decisis question of wrongness. Part I briefly summarizes stare decisis doctrine with particular attention paid to how the Court evaluates and weighs "wrong" precedents. Two radically different approaches to stare decisis appear in the Court's decisions over the last century. The first of these approaches often overturn precedent with very little discussion of external factors beyond wrongness; the second engages at length with factors such as real-world harm, institutional legitimacy, and reliance.

Parts II and III turn to the Court's most recent thorough exposition of stare decisis doctrine—*Ramos v. Louisiana*.[10] Few cases have exposed divisions on the wrongness question like *Ramos*, which yielded five different opinions among the Justices. Each opinion touches on wrongness, revealing dramatically different approaches. This Article divides the wrongness question into two subparts, both explored primarily through the opinions in *Ramos*: (1) how the Court measures wrongness (addressed in Part II); and (2) how the Court weighs wrongness alongside other factors (addressed in Part III).

---

[5] *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991); Lawrence v. Texas, 539 U.S. 558, 560 (2003); June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment).

[6] *E.g.*, Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015).

[7] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018).

[8] *E.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2309 (2021) (quoting *Kimble*, 576 U.S. at 455).

[9] Transcript of Oral Argument at 39, *Dobbs*, No. 19-1392 (2021).

[10] 140 S. Ct. 1390 (2020).

I. TWO APPROACHES TO STARE DECISIS (AND A BONUS FRAMEWORK)

Stare decisis has been a part of our legal tradition since the Founding, a policy we inherited from our British forebears. Blackstone wrote of the "established rule to abide by former precedents," in order to "keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."[11] Two decades later, Alexander Hamilton explained how "strict rules and precedents" would bind "arbitrary discretion" within the "least dangerous" branch.[12] William Cranch, a circuit judge and the second Reporter of Decisions of the United States Supreme Court, noted that the rule of law requires limiting judicial discretion.[13] To Cranch, this was a key benefit of reporting decisions: "Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge."[14]

A. Stare Decisis Before Roe *and* Casey

By the twentieth century, American stare decisis looked very different from its British counterpart. As Justice Brandeis observed in 1932, the British high court "strictly applied [stare decisis] to all classes of cases."[15] After all, "Parliament is free to correct *any* judicial error."[16] Not so in the case of our written Constitution, "where correction through legislative action is practically impossible."[17] Thus, the Supreme Court of the United States "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[18]

At least, the Court bowed to those lessons for most of the twentieth century. Though Justice Brandeis declared that it was "more

---

11 *Id.* at 1411 (Kavanaugh, J., concurring in part) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

12 THE FEDERALIST NO. 78, at 592, 599 (Alexander Hamilton) (Sweetwater Press 2010).

13 William Cranch, *Preface*, 1 Cranch iii (1804), *in* 4 THE FOUNDERS' CONSTITUTION 188, 188 (Philip B. Kurland & Ralph Lerner eds., 1987); *see generally William Cranch*, HIST. SOC'Y OF THE D.C. CIR., https://dcchs.org/judges/cranch-william/ (last visited Feb. 20, 2022) (providing a short biography on Judge Cranch).

14 Cranch, *supra* note 13, at 188.

15 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409–10 (1932) (Brandeis, J., dissenting).

16 *Id.* at 410 (emphasis added).

17 *Id.* at 406–07.

18 *Id.* at 407–08 (footnote omitted).

important that the applicable rule of law be settled than that it be settled right,"[19] wrongness essentially controlled whether the Court felt bound to adhere to precedent. The paradigmatic case overruling precedent looks something like this:

- The issue presented in this case is whether X is unconstitutional.
- X was deemed constitutional in *The X Case*.
- *The X Case* failed to consider the following issues, which we now believe are core to understanding this issue.
- Thus, *The X Case* is no longer harmonious with our jurisprudence, and we overrule it.

Examples of this approach to stare decisis abound. In *Joseph Burstyn, Inc. v. Wilson*, the issue before the Court was whether censorship of motion pictures violated the First Amendment.[20] Decades earlier, *Mutual Film Corp. v. Industrial Commission of Ohio*, held that motion pictures were "not to be regarded . . . as part of the press of the country or as organs of public opinion."[21] In other words, motion pictures received no protection under the First Amendment. As the *Burstyn* Court explained, First Amendment decisions since *Mutual* cast doubt on that conclusion.[22] What's more: *Mutual* was a silent-film -era decision. The advent of the talkies eleven years after *Mutual* altered the First Amendment calculus.[23] Thus, the Court concluded, *Mutual* was "out of harmony with" the Court's modern view of both motion pictures and the First Amendment, and the Court would "no longer adhere to it."[24]

This structure, with slight variations, appeared frequently in the Court's opinions throughout the twentieth century.[25] At least once, the

---

[19] *Id.* at 406.

[20] 343 U.S. 495, 497 (1952).

[21] 236 U.S. 230, 244 (1915).

[22] *Burstyn*, 343 U.S. at 500–02.

[23] *Id.* at 502 n.12.

[24] *Id.* at 502.

[25] *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–57 (1985) (overruling *Nat'l League of Cities v. Usery*); United States v. Scott, 437 U.S. 82, 86–87, 100–01 (1978) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting)) (overruling *United States v. Jenkins*); Katz v. United States, 389 U.S. 347, 349–53 (1967) (overruling the Fourth Amendment trespass doctrine established in *Olmstead v. United States* and *Goldman v. United States*); Gideon v. Wainwright, 372 U.S. 335, 339, 342–45 (1963) (overruling *Betts v. Brady*); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 635–42 (1943) (centering the Court's discussion almost entirely around refuting key premises of the Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).

Court summarily overruled "inconsistent" precedent in a footnote.[26] In many cases, wrongness—as determined by later jurisprudential developments, deviation from fundamental principles, etc.—was the primary justification given for overruling precedent.[27]

B. Contemporary Stare Decisis

Not so today. Unlike the comparatively simple analysis recounted above, the paradigmatic analysis now resembles a jazz standard, beginning with a recitation of the stare decisis tune and transitioning to an improvisational free-for-all before concluding.

First, the tune: stare decisis is a critically important policy. Precedents "warrant [the Justices'] deep respect as embodying the considered views of those who have come before."[28] The Justices "approach the reconsideration of [the Court's] decisions with the utmost caution."[29] Adherence to precedent is "a foundation stone of the rule of law,"[30] "promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process."[31]

After recounting these principles, the tune reaches its bridge: As foundational as stare decisis may be, it is not "an inexorable command."[32] Some precedents are so wrong and so harmful that it is worse to keep them than to get rid of them. Stare decisis is especially weak when revisiting constitutional precedents,[33] though it is stronger

[26] Craig v. Boren, 429 U.S. 190, 210 n.23 (1976).

[27] I do not argue that the Court did not weigh the "practical effects" of overruling precedent. *See generally* Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944) (explaining that the Court considers the pragmatic consequences of reversing itself). I argue only that those effects weighed far less in the analysis than did the issue of wrongness in most cases.

[28] Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

[29] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

[30] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)); *see also* Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("[The stare decisis doctrine's] greatest purpose is to serve a constitutional ideal—the rule of law.").

[31] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

[32] *E.g.*, *Ramos*, 140 S. Ct. at 1405 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)); *id.* at 1412 (Kavanaugh, J., concurring in part); *id.* at 1432 (Alito, J., dissenting); *Janus*, 138 S. Ct. at 2478 (quoting *Pearson*, 555 U.S. at 233); *Wayfair*, 138 S. Ct. at 2096 (quoting *Pearson*, 555 U.S. at 233); *Kimble*, 576 U.S. at 455 (quoting *Payne*, 501 U.S. at 828); *see also Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

[33] *E.g.*, *Janus*, 138 S. Ct. at 2478 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

when revisiting statutory precedents.[34] Regardless of the context, however, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."[35]

Then back to the A-section: rule-of-law principles mean the Court cannot simply overrule precedent because it is wrong. That step requires "strong grounds"[36] or a "special justification"[37] beyond mere wrongness.

Having played through the tune, the Justices begin to improvise. To find a "special justification" (or a lack thereof), they draw on a wide collection of "somewhat elastic . . . factors"[38] in an ad hoc fashion with no "consistent methodology or roadmap"[39] for reassessing precedent. Justice Kavanaugh's recent non-exclusive catalogue of these factors included:

- the quality of the precedent's reasoning;
- the precedent's consistency and coherence with previous or subsequent decisions;
- changed law since the prior decision;
- changed facts since the prior decision;
- the workability of the precedent;
- the reliance interests of those who have relied on the precedent; and
- the age of the precedent.[40]

These factors need not be—and often are not—considered in every case. Instead, the Justices draw whichever factors they find relevant and apply them with whatever weight they deem necessary.

In other words, "special justification" is in the eye of the beholder. The varying weight placed on reliance interests illustrates the point. To some Justices, reliance interests provide the counterbalance to wrongness and workability issues.[41] This suggests that reliance

---

[34] *E.g.*, *Kimble*, 576 U.S. at 456.

[35] *Ramos*, 140 S. Ct. at 1405.

[36] *E.g.*, *Janus*, 138 S. Ct. at 2478 (citing United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 855–56 (1996) and *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring)).

[37] *E.g.*, *Kimble*, 576 U.S. at 455–56 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

[38] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

[39] *Id.*

[40] *Id.* Justice Kavanaugh's list excludes at least one factor—institutional legitimacy—explicitly considered by the Justices in the past. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992).

[41] *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019) (finding untenable any objections to overruling a precedent that generated no reliance interests); *see*

interests must be present to uphold a wrong precedent. But other Justices see reliance interests as only a "plus-factor"—they need not exist for the Court to stand by a previous error.[42] At least one Justice thinks the Court should not consider reliance interests at all.[43] And that doesn't begin to scratch the surface with the *types* of reliance interests the Court should consider.[44]

No bright temporal line marks the Court's shift from one approach to the other. But *Casey* serves as a clear inflection point. The Court occasionally considered reliance interests and workability issues before *Casey*.[45] And since *Casey*, the Court has occasionally overruled precedents without engaging in this elaborate modern dance.[46] Even *Casey* summarily overturned two precedents based on wrongness—after its dramatic consideration of extralegal factors with respect to *Roe v. Wade*.[47]

But it is no secret that the Court's abortion precedents lurk in the background of every case involving stare decisis.[48] *Roe* and *Casey* have become litmus tests for judicial appointees.[49] As one former clerk for

Jackson, *supra* note 27 (explaining that reliance interests have an effect in stare decisis matters).

[42] *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting) (emphasis removed).

[43] *Ramos*, 140 S. Ct. at 1425 n.1 (Thomas, J., concurring in the judgment).

[44] *Compare, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 809 (2009) (Stevens, J., dissenting) (arguing that requiring police interrogations to end once a defendant requests counsel created a public interest "in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State"), *with id.* at 793 n.4 (majority opinion) (rejecting this reliance interest).

[45] *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[46] *E.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1559–60 (2021) (overruling the "watershed" rule articulated by *Teague v. Lane*, 489 U.S. 288 (1989), "that never actually applies in practice"); United States v. Cotton, 535 U.S. 625, 629–31 (2002); Agostini v. Felton, 521 U.S. 203, 235–36 (1997).

[47] *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–56, 860–61, 864–69 (1992) (going to extreme lengths to uphold precedent), *with id.* at 881–82 (overruling other precedents with ease).

[48] *E.g.*, Nina Totenberg, *Supreme Court Justices Continue to Struggle with Precedent*, NAT'L PUB. RADIO (June 26, 2019, 6:10 PM), https://www.npr.org/2019/06/26/736344189/supreme-court-justices-continue-to-struggle-with-precedent ("First and foremost, [stare decisis is] about Roe vs. Wade and the [C]ourt's other abortion precedents.").

[49] *See, e.g.*, JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 221 (2007) (explaining that the issue of abortion has "consumed Supreme Court nominations and confirmation proceedings"); *id.* at 232 ("The issue of abortion came to dominate Roberts's private meetings with senators [during his confirmation process]. In almost every session, with senators on both sides, the key question was about his views on abortion."); Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020) (observing that "every Supreme Court nominee [is] quizzed about her views on the role of precedent in decisionmaking and, indirectly, the continued vitality of *Roe*"); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1191 (1988) (noting

Roe's author observed, Senators "practically require that a judicial nominee sign on to logic that is, at best, questionable, and at worst, disingenuous and results-oriented."[50] And anxiety over abortion reaches fever pitch with each overruling.[51]

Judge Ken Starr has humorously compared the Court's modern handwringing over precedent to the titular hero in Shakespeare's *Hamlet*: "To overrule, or not to overrule?"[52] That is the question. When faced with the prospect of overruling precedent, the Court laments the wrongness and unfairness of the precedent but fears that overturning it might prove even worse. Or perhaps another soliloquy two scenes later in *Hamlet* provides the more apt analogy: "Now might we do it pat," the Court signals as it grants certiorari on the question of whether to revisit an oft-criticized decision.[53] But wait—perhaps this case is not the right vehicle.[54] Or maybe the reliance interests on the old decision are too strong.[55] And what if the public perceives a reversal as the Court buckling under political pressure?[56]

---

that pro-abortion advocates have become focused on keeping at least five supportive Justices on the Supreme Court).

[50] Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002), https://supreme.findlaw.com/legal-commentary/the-lingering-problems-with-roe-v-wade-and-why-the-recent-senate-hearings-on-michael-mcconnells-nomination-only-underlined-them.html.

[51] *E.g.*, Ruth Marcus, Opinion, *Why a Case About Jury Verdicts Could Spell Trouble for* Roe v. Wade, WASH. POST (Apr. 24, 2020), https://www.washingtonpost.com/opinions/why-a-case-about-jury-verdicts-could-spell-trouble-for-roe-v-wade/2020/04/24/2a3e2072-8660-11ea-878a-86477a724bdb_story.html (speculating about *Roe* and *Casey* in light of *Ramos v. Louisiana*); Noah Feldman, Opinion, *Supreme Court's Administrative Law War Previews Abortion Battle*, BLOOMBERG (June 26, 2019, 12:41 PM), https://www.bloomberg.com/opinion/ articles/2019-06-26/justice-roberts-stare-decisis-and-abortion-matter-in-kisor-case (speculating about *Roe* and *Casey* in light of *Kisor v. Wilkie*); Leah Litman, Opinion, *Supreme Court Liberals Raise Alarm Bells About* Roe v. Wade, N.Y. TIMES (May 13, 2019), https://www.nytimes. com/2019/05/13/opinion/roe-supreme-court.html (speculating about abortion in light of *Franchise Tax Board v. Hyatt*); Jay Willis, *The Supreme Court Just Outlined How It Might Get Rid of Abortion Rights*, GQ (May 13, 2019), https://www.gq.com/story/ supreme-court-hyatt-abortion-rights (same); *see also* Editorial Board, Opinion, *When Legal Precedent Is Discarded by the Supreme Court, Abortion Rights Are Threatened*, BALT. SUN (May 15, 2019, 6:00 AM), https://www.baltimoresun.com/opinion/editorial/bs-ed-0515-supreme-abortion-20190 514-story.html (same).

[52] KEN STARR, RELIGIOUS LIBERTY IN CRISIS: EXERCISING YOUR FAITH IN AN AGE OF UNCERTAINTY 39 (2021).

[53] *Cf.* WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3, l. 73 (Joseph Quincy Adams ed., 1992).

[54] *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1877 (2021) ("[W]e need not revisit [*Employment Division v. Smith*] here. This case falls outside *Smith* . . . ."). The Court had granted certiorari on the question of whether to revisit *Employment Division v. Smith*, 494 U.S. 872 (1990). *Fulton*, 141 S. Ct. at 1887 (Alito, J., dissenting).

[55] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 457–58 (2015).

[56] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

This characterization may be uncharitable, but it is not altogether unfair. After all, a Court overly concerned with political pressure and reliance interests might not have possessed the fortitude to end school segregation or permit minimum wage laws.[57] Thankfully, the Court that decided *Brown v. Board of Education* was not so squeamish.

C. Justice Kavanaugh's Proposed Framework

In *Ramos v. Louisiana*, Justice Kavanaugh took a crack at outlining a consistent stare decisis framework for the Court. Surveying and categorizing the factors previously identified by the Court, Justice Kavanaugh suggests "three broad considerations" that can provide structure to the Court's search for a "special justification."[58] In other words, Justice Kavanaugh's roadmap is intended to limit judicial discretion when considering whether to overrule precedent.

The first of these considerations is wrongness. Not just any wrongness—the precedent must be "grievously or egregiously wrong."[59] Similar to the Court's stare decisis analysis throughout the twentieth century, Justice Kavanaugh explains that "the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability" all may contribute to an opinion's wrongness.[60] He further notes that a precedent "may be egregiously wrong when decided," later "unmasked" as wrong, "or both."[61]

The second consideration is whether "the prior decision caused significant negative jurisprudential or real-world consequences."[62] Has the precedent created issues of "consistency and coherence?"[63] Has it harmed the citizenry?[64] These harms must be weighed against the "reliance interests" that overruling precedent might "unduly upset."[65]

Justice Kavanaugh's framework takes seven or eight factors and condenses them to three. In that sense, the framework improves upon the modern body of law by simplifying the analysis. This simplification,

[57] *See* Citizens United v. FEC, 558 U.S. 310, 377–78 (2010) (Roberts, C.J., concurring) (concluding that inflexible adherence to stare decisis would have protected *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the jurisprudential descendants of *Lochner v. New York*, 198 U.S. 45 (1905)).

[58] Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

[59] *Id.*

[60] *Id.* at 1414–15.

[61] *Id.* at 1415.

[62] *Id.*

[63] *Id.*

[64] *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) and W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630–42 (1943)).

[65] *Id.*

with additional refinement, likely will contribute to a more predictable stare decisis doctrine.

Ambiguities remain, however. The remainder of this Article focuses on two such ambiguities related to the first consideration—the methodology for measuring wrongness and the impact wrongness has on the stare decisis calculus. Nevertheless, the Court would move the doctrine in the right direction by adopting Kavanaugh's framework. Justices at the margins of the stare decisis spectrum likely will not accept it. A Justice who believes that reliance questions are not "susceptible of principled resolution" would probably reject any formula that weighs reliance interests.[66] A Justice on the other end of the spectrum who believes the Court should balance ill effects against other factors such as stability in the law—with reliance interests adding only a "plus-factor"—probably will not accept a calculus in which reliance provides the primary counterbalance.[67] But Justice Kavanaugh's framework seems to encapsulate the mainstream approach to stare decisis in an effective way.

II. MEASURING WRONGNESS

The issue of wrongness today may be divided into at least two subparts. The first subpart concerns what counts as wrong. Is a precedent wrong because it reached the wrong conclusion? That is, should the Court analyze the problem as if in the first instance and compare its answer to the precedent in question? Or should the Court focus on the reasoning—e.g., logical leaps or faulty premises—rather than the bottom line?

Both approaches have their benefits and drawbacks. The former approach, which we might call a *contemporary* approach, allows the Court to rely on modern interpretive methods that are more familiar. Textualist jurists, for example, can rely on canons of interpretation to determine what the "correct" answer is and compare that answer to the precedent.[68] The use of familiar tools provides a level of comfort for jurists when reassessing precedents that may have arrived at their

---

[66] *Id.* at 1425 n.1 (Thomas, J., concurring in the judgment).

[67] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) (emphasis removed).

[68] J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 43–44 (2012) (explaining that jurists who rely primarily on textual meaning in constitutional interpretation can approach constitutional text as they would statutory text—a source of law with which jurists are accustomed and which they interpret on a near-daily basis); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 204–05 (2018) (discussing how textualist jurists analyze and interpret statutes to discern the proper meaning).

result by an unfamiliar path.

But the comfort level inherent in this approach comes at a cost. As judicial philosophy shifts—due to current events, changing membership, or the passage of time—more precedents may be called into question.[69] Unmitigated, this approach would undermine the rule-of-law principles like stability and predictability that stare decisis is intended to serve. This concern animated the Chief Justice's question about wrongness in *Dobbs*. "[I]f we look at [wrongness] from . . . today's perspective, it's going to be a long list of cases that we're going to say were wrongly decided."[70]

One can solve this conundrum by assuming the prior Court's unspoken premises about interpretation and adopting a *contemporaneous focus*. If a litigant asks the Court to revisit a precedent, the Justices should view the precedent through that precedent's own interpretive lens. By assuming the earlier Court's starting point was correct, the present Court can look at both the quality of the challenged decision's reasoning and its fit with contemporaneous decisions. Most modern invocations of stare decisis seem to take this latter approach when determining wrongness.[71] But occasionally, a bias toward contemporary interpretive methods creeps into the Court's analysis.[72]

Separate from the question of how to determine wrongness is the question of how wrongness impacts the stare decisis calculus. That is, once we determine a precedent is wrong, does that conclusion weigh in favor of overturning a precedent? Or does it merely permit the Court to consider whether other factors justify correcting the error? If the precedent *does* weigh into the calculus, is it possible that a precedent's wrongness can provide the *sole* justification for overturning it? This Part will describe the various approaches to these questions as they

---

[69] *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (criticizing the majority's decision to overrule precedent based on mere disagreement with the precedent); Litman, *supra* note 51 (expressing concerns that *Roe* will be overturned merely because some of the current Justices on the Supreme Court view the decision as simply erroneous); Willis, *supra* note 51 (same); Editorial Board, *supra* note 51 (same). *E.g.*, Lawrence v. Texas, 539 U.S. 558, 566–68 (2003) (noting, in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), that individual privacy regarding sexual behavior is of greater importance than the *Bowers* Court had considered it).

[70] Transcript of Oral Argument at 40, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

[71] *E.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2479–81 (2018); *see also* Harris v. Quinn, 573 U.S. 616, 635–38 (2014) (discussing *Abood v. Detroit Board of Education*'s, 431 U.S. 209 (1977), flawed reasoning and providing the basis for *Janus*'s analysis).

[72] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1395–97 (2020) (beginning the opinion with an analysis of the Sixth Amendment's meaning at the time of its ratification).

appear in *Ramos*.[73]

A. Ramos v. Louisiana

A Louisiana jury convicted Evangelisto Ramos of second-degree murder by a vote of 10-2.[74] Mr. Ramos appealed this conviction all the way to the Supreme Court of the United States. The constitutional issue in *Ramos* is relatively straightforward: does the Sixth Amendment permit nonunanimous verdicts?[75] The wrinkle, however, is that the Court seemingly answered this question forty-eight years earlier in *Apodaca v. Oregon*.[76]

By a 5-4 vote, the *Apodaca* Court held that the Sixth Amendment did not require jury unanimity to obtain a conviction.[77] A four-Justice plurality explained that neither the text nor the drafting history of the Sixth Amendment indicated which elements of the common-law jury system were constitutionalized.[78] Instead, the plurality focused on "the function served by the jury in contemporary society."[79] Juries "prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'"[80] Concluding that this function was served equally well by 10-2 and 11-1 verdicts, the plurality voted to uphold Oregon's nonunanimous jury rule.[81]

Justice Powell provided the critical fifth vote to affirm Mr. Apodaca's conviction, but his reasoning differed from the plurality. Justice Powell reasoned that, though the Sixth Amendment required jury unanimity to obtain a *federal* conviction, it need not require jury unanimity in *state* courts.[82] The issue with this theory, as Justice Powell recognized at the time, is that dual-track incorporation had already been rejected by the Court.[83]

---

[73] The groupings that formed in *Ramos* are not fixed and tend to shift according to other extralegal considerations. *See generally* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189 (2014) (describing how normative interpretive theory can explain much of the Court's inconsistency on stare decisis).

[74] State v. Ramos, 231 So. 3d 44, 46 (La. Ct. App. 2017); *see Ramos*, 140 S. Ct. at 1393–94.

[75] *Ramos*, 140 S. Ct. at 1394.

[76] 406 U.S. 404 (1972). *Apodaca* was decided along with a companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972).

[77] *Apodaca*, 406 U.S. at 404–06.

[78] *Id.* at 407–10.

[79] *Id.* at 410.

[80] *Id.* (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).

[81] *Id.* at 411, 414.

[82] Johnson v. Louisiana, 406 U.S. 356, 371, 375–76 (1972) (Powell, J., concurring).

[83] *Id.* at 375.

In *Ramos*, the Court's task was to determine whether stare decisis required affirming or rejecting *Apodaca*.[84] A majority of the Court concluded that *Apodaca* ought to be abandoned.[85] But the resulting five opinions reflect very different approaches to a precedent's wrongness and how it should impact the ultimate determination of whether to abandon or adhere to precedent.

B. The Court's Wrongness Benchmarks in Ramos

The *Ramos* majority applies a kitchen-sink approach to stare decisis that is, at times, somewhat difficult to pin down. On the question of how to measure wrongness, the *Ramos* majority vacillates between a contemporaneous focus and a contemporary focus. The Court criticizes the *Apodaca* plurality for deviating from the Court's repeated affirmations—in dicta—that the Sixth Amendment requires jury unanimity.[86] According to the *Ramos* majority, *Apodaca* was "an outlier on the day it was decided, one that's become lonelier with time."[87] The opinion attacks the Louisiana and Oregon laws for their racist origins,[88] and it faults *Apodaca* for failing to consider them.[89] And it denounces the *Apodaca* concurrence's reliance on a rejected theory of incorporation.[90] The opinion (commanding less than a majority at this point) even goes so far as to suggest that *Apodaca* may

---

[84] Lurking in the background of *Ramos* was the question of which opinion in *Apodaca*—if either—provided the relevant precedent. *Compare* Ramos v. Louisiana, 140 S. Ct. 1390, 1403–04 (2020) (explaining why *Apodaca* does not apply) *with id.* at 1430 (Alito, J., dissenting) (explaining why *Apodaca* should apply). This question is ultimately irrelevant; each opinion that favored overruling *Apodaca* did so regardless of its reasoning, and the dissent seems to suggest that it would have reaffirmed *Apodaca* under either rationale.

[85] *Id.* at 1408.

[86] *Id.* at 1396, 1399 n.38 (majority opinion).

[87] *Id.* at 1408 (plurality opinion). Though only four justices joined this portion of the opinion, Justice Kavanaugh added a similar observation in his concurrence. *Id.* at 1416 (Kavanaugh, J., concurring in part) (explaining that *Apodaca* "was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier"); *see also id.* at 1406 (majority opinion) ("[C]alling *Apodaca* an outlier would be perhaps too suggestive of the possibility of company.").

[88] *Id.* at 1394 (majority opinion).

[89] *Id.* at 1405. The Court repeatedly opined about the necessity of grappling with the law's "uncomfortable past." *Id.* at 1401 n.44. But no member of the Court attempted to explain how this history was relevant to the Sixth Amendment's mandate. At least one member of the Court self-consciously nodded toward the legal tenuity of this argument, explaining that Mr. Ramos had not "br[ought] an equal protection challenge." *Id.* at 1410 (Sotomayor, J., concurring). Still, she explained, that "history is worthy of this Court's attention." *Id.* Another Justice attempted half-heartedly to tie it into other stare decisis factors. *Id.* at 1417–18 (Kavanaugh, J., concurring in part).

[90] *Id.* at 1398 (majority opinion).

have produced no precedent at all.[91] After all, if Justice Powell's concurrence were controlling, then "a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."[92]

These criticisms generally reflect a contemporaneous view of wrongness. The Court's previous statements about the Sixth Amendment's unanimity requirement existed when *Apodaca* was decided.[93] The racist genesis of the nonunanimous jury rules occurred decades earlier.[94] And of course, Justice Powell knew that the Court had already rejected dual-track incorporation, even lamenting that his argument came "late in the day."[95]

But the *Ramos* Court often leans on a more contemporary focus. The opinion's analysis of the Sixth Amendment begins—in decidedly originalist fashion—with a discussion of the history and original public meaning attached to the phrase "jury trial."[96] According to the Court, this history definitively establishes the *correct* answer to the question presented: The Sixth Amendment demands jury unanimity.[97] Answer key in hand, the Court derides its predecessor for arriving at the wrong result. *Apodaca*'s reasoning was poor, the Court concludes, at least in part because "the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right."[98] Its "functionalist" reasoning was no more than "a breezy cost-benefit analysis" that eroded a constitutional right.[99]

Justice Sotomayor challenged the majority's functionalism charge, noting that "[r]easonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation."[100] She stopped short, however, of a complete disavowal, arguing only that the use of "different interpretive tools . . . is not a reason *on its own* to discard precedent."[101] Instead, Justice

---

[91] *Id.* at 1402–04 (plurality opinion).

[92] *Id* at 1402.

[93] *See id.* at 1425, 1431 (Alito, J., dissenting) (illustrating cases prior to *Apodaca* that discussed the Sixth Amendment).

[94] *Id.* at 1426.

[95] Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring).

[96] *Ramos*, 140 S. Ct. at 1395–97 (majority opinion). The Court may have felt compelled to analyze this issue de novo because Louisiana insisted the Court had never definitively passed on the question. *Id.* at 1394–95. Nevertheless, the Court's opinion is not so cabined—the historical and original meaning analysis provides much of the basis of the Court's criticism of *Apodaca*. *Id.* at 1405.

[97] *Id.* at 1397.

[98] *Id.* at 1405.

[99] *Id.* at 1401.

[100] *Id.* at 1409 (Sotomayor, J., concurring). Nevertheless, Justice Sotomayor joined parts of the majority/plurality opinion that made these criticisms.

[101] *Id.* (emphasis added).

Sotomayor attempted to guide the discussion back toward the contemporaneous wrongness of *Apodaca*. *Apodaca* was wrong because it was "a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established *both before and after the decision*."[102]

The two other concurrences were, like the majority opinion, more equivocal about whether *Apodaca*'s interpretive tools could factor into the wrongness analysis. Justice Thomas, for instance, found "no need to prove the original meaning of the Sixth Amendment right to a trial by jury" to strike down Louisiana's nonunanimous rule.[103] Still, his opinion placed heavy emphasis on historical evidence of the meaning of the Sixth Amendment—at its ratification and at the ratification of the 14th Amendment—to establish that the Court's precedents requiring unanimity were "not outside the realm of permissible interpretation."[104]

Justice Kavanaugh similarly emphasizes original public meaning alongside the Court's other Sixth Amendment decisions to conclude that *Apodaca*'s holding was "egregiously wrong."[105] Three times in a single paragraph, Justice Kavanaugh points to "the original meaning and this Court's precedents" or "lines of decisions" as the benchmarks for assessing a case's wrongness.[106] But what benchmark applies when "the original meaning" of a constitutional provision conflicts with "this Court's precedents" interpreting that provision? Justice Kavanaugh doesn't say.

In a dissent authored by Justice Alito, three Justices analyzed *Apodaca*'s reasoning through a decidedly contemporaneous lens.[107] Discussing the *Apodaca* plurality, the dissenters acknowledge that they might not "have agreed either with" its conclusion or its rationale had they been on the Court.[108] That fact alone, however, did not render *Apodaca* indefensible. As the dissenters explain, the *Apodaca* Court had little need to address thoroughly the historical meaning of the Sixth Amendment—because it had done so two years earlier in *Williams v. Florida*.[109]

Far from a "breezy cost-benefit analysis," *Apodaca* was a

---

[102] *Id.* (emphasis added).

[103] *Id.* at 1425 (Thomas, J., concurring).

[104] *Id.* at 1421–22. Justice Thomas circumvents *Apodaca*'s conclusion that the Sixth Amendment's unanimity requirement did not apply to the states by explaining that the opinions in *Apodaca* addressed only due process incorporation, a "demonstrably erroneous" theory. *Id.* at 1424.

[105] *Id.* at 1416 (Kavanaugh, J., concurring in part).

[106] *Id.*

[107] *Id.* at 1425 (Alito, J., dissenting).

[108] *Id.* at 1434.

[109] *Id.* at 1433 (citing Williams v. Florida, 399 U.S. 78, 92–100 (1970)).

continuation of the analysis in *Williams*, where the Court sought to identify the central features of the common-law jury right.[110] The *Ramos* dissenters did not substitute their own historical analysis for *Apodaca*'s. They did not engage in their own inquiry to uncover the jury trial's purpose. They did not, in other words, produce an answer key. Instead, they met the *Apodaca* Court on its own terms and worked backwards to determine whether *Apodaca*'s reasoning is defensible *on those terms*.[111]

So, too, with Justice Powell's concurrence. Though the dual-track incorporation theory had fallen out of favor in recent years, it was hardly an "idiosyncratic" position.[112] Indeed, the dissenters argued, that theory "has old and respectable roots."[113] In fact, some members of the *Ramos* majority had argued in favor of dual-track incorporation of the Second Amendment only ten years earlier.[114]

The varying analyses in *Ramos* laid bare the dichotomy between a contemporaneous approach and a contemporary approach to analyzing wrongness. Using modern interpretive philosophies to craft a measuring stick for an older precedent will often reveal significant "flaws" in the older precedent's reasoning. An originalist and a living constitutionalist will often disagree about rationale—even if they agree on a conclusion. Some jurists take a more active or engaged approach to assessing constitutionality, believing that they should "take alarm at the first experiment on our liberties."[115] Other jurists might subscribe to Oliver Wendell Holmes's famous "puke" test—a judge should uphold a statute as constitutional in all cases except where it makes them feel like vomiting.[116] Can there be any question that two philosophies would lead to radically different outcomes?[117] Under such

---

[110] *Id.* at 1433–34.

[111] *Id.*

[112] *Id.* at 1434.

[113] *Id.*

[114] *Id.* at 1434–35, 1435 n.27.

[115] Engel v. Vitale, 370 U.S. 421, 436 (1962) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987)).

[116] Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926), *reprinted in* 2 HOLMES-LASKI LETTERS 887, 888 (Mark DeWolfe Howe ed., 1953). Though I struggle to reconcile these two approaches, some jurists have apparently adhered to both theories simultaneously. *Compare* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (Frankfurter, J., for the Court) (explaining that the courts should interfere with "popular policy" only "where the transgression of constitutional liberty is too plain for argument"), *with* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 41 (1947) (Rutledge, J., joined by Frankfurter, J., dissenting) (quoting Madison, *Memorial and Remonstrance*, *supra* note 115, at 82) (arguing that the Court should "not tolerate 'the first experiment on our liberties'").

[117] Such radical philosophical shifts on the Court are not unheard of. *Compare*

circumstances, the contemporary approach will more frequently justify revisiting precedent than the contemporaneous alternative.

In contrast, meeting the precedent on its own philosophical terms ensures that the Court revisits only those decisions that are *egregiously* wrong. If the goal of stare decisis is to "limit the number of overrulings and maintain stability in the law,"[118] that goal is probably better served by a contemporaneous approach to wrongness.

III. WEIGHING WRONGNESS

Unquestionably, the benchmark the Court uses to address wrongness is critically important to the stare decisis analysis. The Chief Justice would not have wasted precious time at oral argument on a frivolous question—especially not in a case of the magnitude of *Dobbs*.

But assuming the Court adopted a unified approach to assessing wrongness, there remains another, equally important question: how does that wrongness factor into the broader calculus? Is wrongness a mere permission slip to reevaluate precedent? Is it a factor that weighs in favor of overruling a precedent? Is it the *only* factor? Said differently, what is the intrinsic value of "correct answers"? Certainly, that intrinsic value is something greater than zero. After all, the Court does not concern itself with the negative effects that flow from correct interpretations of the law.[119]

The intrinsic value of "getting it right" lies at the heart of another colloquy during *Dobbs* oral argument, this one between Justice Alito and United States Solicitor General Elizabeth Prelogar. Justice Alito asked the Solicitor General a simple, utterly loaded question: can a precedent "be overruled simply because it was egregiously wrong?"[120] The Solicitor General answered that a litigant would have to offer "some kind of materially changed circumstance or some kind of

---

Gobitis, 310 U.S. at 597–600 (illustrating a Court that was hesitant to intrude upon the legislature's policy decisions regardless of the constitutional nature of the claim), *with* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (illustrating a different-minded Court that was comfortable protecting constitutional rights even when policy implications were involved).

[118] *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

[119] *See, e.g.*, Minerva Surgical, Inc. v. Hologic, Inc., 141 S. Ct. 2298, 2309 (2021) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015)) ("[C]orrect judgments have no need for [stare decisis] to prop them up."); Gamble v. United States, 139 S. Ct. 1960, 1969–70, 1974, 1976–80 (2019) (analyzing and rejecting evidence of the precedent's wrongness without considering other stare decisis factors); *Kimble*, 576 U.S. at 455 ("Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions.").

[120] Transcript of Oral Argument at 92, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

materially new argument."[121] Justice Alito followed: "So suppose Plessy versus Ferguson was re-argued in 1897, so nothing had changed. Would it not be sufficient to say that was an egregiously wrong decision on the day it was handed down and now it should be overruled?"[122] Ultimately, the Solicitor General argued that the Court has "never overruled" a case "based [solely] on a conclusion that the decision was wrong."[123]

As Josh Blackman pointed out the following day, this is not quite true.[124] Blackman points to two examples where the Court has overruled itself based solely on the precedent's wrongness.[125] The first, the *Legal Tender Cases*,[126] overruled a decision from the previous year that had held the Legal Tender Act unconstitutional.[127] The second, *Barnette*, overruled *Gobitis* in "one of the most stunning reversals in Supreme Court history."[128]

General Prelogar's normative view of stare decisis—that the Court should overrule precedent only when the impetus is something more than wrongness—is roughly consistent with mainstream thought, though it is probably much more protective than the median approach.[129] For instance, most people probably would not conclude that stare decisis should have shielded *Plessy* until we had more information on the harms caused by segregation. There are some decisions that are so "grievously or egregiously wrong" that they should not be allowed to stand.[130]

Most jurists conceive of stare decisis as a balancing test.[131] When

---

[121] *Id.*

[122] *Id.*

[123] *Id.* at 95.

[124] Josh Blackman, *Yes, The Supreme Court Has Reversed A Precedent Based Entirely On Its Wrongness*, VOLOKH CONSPIRACY (Dec. 2, 2021, 11:58 PM), https://reason.com/volokh/2021/12/02/yes-the-supreme-court-has-reversed-a-precedent-based-entirely-on-its-wrongness/.

[125] *Id.* As I read Blackman's argument, it implicitly defines wrongness as being an incorrect legal interpretation—not merely a poor fit with related precedent. This Article's definition of wrongness is broader. *See supra* note 27 and accompanying text (explaining the scope of this Article). This definition is closer to Justice Kavanaugh's definition of wrongness. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (explaining the egregiously wrong requirement of stare decisis).

[126] 79 U.S. (12 Wall.) 457 (1871).

[127] *Id.* at 553 (overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869)).

[128] John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 803 (2014).

[129] *See* Transcript of Oral Argument, *supra* note 120 (arguing that, in addition to wrongness, material changes in the circumstances are necessary to overrule precedent); *see supra* Section I.C (labeling Justice Kavanaugh's framework as the mainstream approach).

[130] *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

[131] *See* Jackson, *supra* note 27, at 334 (opining that most lawyers do not regard stare decisis to be an absolute principle).

revisiting precedent, the Justices must appraise "the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[132] The focus of this Part is whether the Court believes that wrong decisions by their very nature cause harm. Is wrongness *only* a threshold question—a condition precedent to the stare decisis analysis? Or does it provide additional weight in favor of overruling the precedent?

If wrongness provides only permission to weigh the factors, then the Court could not overrule a case simply because it was wrongly decided. Getting the "correct" legal answer has only negligible intrinsic value compared to the property, contract, and even the societal interests that arise in the wake of the wrong decision. In fact, no such interests need to be demonstrated in the absence of significant negative effects. Wrongness itself cannot justify overturning precedent.

This was the Solicitor General's overarching point at oral argument in *Dobbs*: Litigants must provide new evidence of "materially changed circumstance[s]" before the Court could overrule precedent.[133] This applies even to the cases that make up the anticanon. Under this approach, the Court could not legitimately overrule *Plessy* without the social science research that laid the foundation for *Brown*. Nor could it overrule *Lochner* without witnessing the ills of constitutionalized laissez-faire economics.

General Prelogar's view is not without proponents on the Supreme Court. Justice Kagan has adopted a rigid approach to stare decisis, repeatedly opposed overruling any precedent based solely on its wrongness.[134] Not only that—Justice Kagan has also argued that the Court should reaffirm a wrong opinion on the sole basis of stare decisis values such as "stability in the law."[135] By placing primacy on these values, Justice Kagan espouses a uniquely strict view of how "special" a justification must be for the Court to depart from stare decisis, making her far less likely to vote to overturn precedent than her

---

[132] *Id.*

[133] Transcript of Oral Argument at 92, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021).

[134] *E.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) ("[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea 'that the precedent was wrongly decided.'" (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014))); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., joined by Kagan, J., dissenting) ("It is . . . dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question.").

[135] *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

colleagues.[136]

Justice Thomas rests at the opposite end of this spectrum, viewing wrongness as the *only* relevant factor for whether to overturn precedent. "[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."[137] Thomas argues that by weighing "stability," "reliance," and "judicial 'humility'" against wrong legal interpretations, the Court "invites conflict with its constitutional duty."[138] After all, as a former Justice once described his constitutional role, a Justice swears "to support and defend" the Constitution, "not the gloss which his predecessors may have put on it."[139] The question for Justice Thomas is relatively straightforward: is the precedent "demonstrably erroneous?"[140]

Both Justice Thomas's and Justice Kagan's approaches surely appeal to those of us who value consistency and transparency. "The Court's multifactor balancing test for invoking *stare decisis* has

---

[136] Adam Feldman, *Empirical SCOTUS: Precedent: Which Justices Practice What They Preach*, SCOTUSBLOG (July 7, 2020, 2:35 PM), https://www.scotusblog.com/2020/07/empirical-scotus-precedent-which-justices-practice-what-they-preach/ ("Kagan has the lowest [vote-to-overrule] rate of all the justices during [the Roberts Court] period, at just over 33 percent.").

[137] Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring in the judgment) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)); *see also* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925 (2017) ("[B]efore originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text's original meaning constitutes the law and relevant precedent deviates from it.").

[138] *Gamble*, 139 S. Ct. at 1988.

[139] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). This is probably about as far as the agreement between Justices Thomas and Douglas would go on this particular point. Justice Douglas saw overruling precedent as an important means of facilitating the evolution of our Constitution. *Id.* at 739; *see also* Barrett, *supra* note 137, at 1925 & n.15 (explaining that our living Constitution must remain updated by overruling precedent as necessary).

[140] *See Ramos*, 140 S. Ct. at 1421 (Thomas, J., concurring in the judgment) (applying the Court's past statements about the need for jury unanimity under the Sixth Amendment because that "interpretation is not demonstrably erroneous"); *id.* at 1422 (explaining that Louisiana's argument about the drafting history of the Sixth Amendment "fails to establish that the Court's decisions are demonstrably erroneous"); *id.* at 1424 (Thomas, J., concurring in the judgment) ("Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment. . . . I 'decline to apply the legal fiction' of due process incorporation." (quoting Timbs v. Indiana, 139 S. Ct. 682, 692 (2019))); *see also id.* at 1422 (noting that the precedents establishing jury unanimity as a requirement of the Sixth Amendment are "not outside the realm of permissible interpretation"); *id.* at 1424 ("Close enough is for horseshoes and hand grenades, not constitutional interpretation.").

resulted in policy-driven, 'arbitrary discretion.'"[141] Justice Thomas's approach has the benefit of eliminating those questions unsusceptible of "principled resolution,"[142] even though "there is room for honest disagreement, even as we endeavor to find the correct answer."[143] Justice Kagan's formulation employs some of the factors Justice Thomas decries, including plus factors and "superpowered" stare decisis.[144] Nevertheless, her approach to stare decisis ultimately comes down to how strong the reasons are for overruling existing precedent. To be sure, there is more wiggle room here than in the "demonstrably erroneous" test. But the approach is far more consistent than most, as Justice Kagan's voting record in stare decisis cases suggests.[145]

The majority opinion in *Ramos* suggests that the median approach to stare decisis places value on finding the right answer, though it's unclear how that weighs into the analysis. The opinion lists "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision" as the factors that dictate whether to overrule *Apodaca*.[146] Three of these four factors—quality of the reasoning, consistency with other decisions, and its fit with later decisions—implicitly point toward the decision being wrong.[147]

And yet, the controlling opinion actually places greater weight on wrongness than it lets on. Even *reliance* is transformed into a question of wrongness. True, the majority acknowledged, hundreds of cases would need to be retried if the Court reversed *Apodaca*.[148] But there's another reliance interest at stake, a plurality argues—"maybe the *most important* one: the reliance interests of the American people."[149] It is a nifty maneuver by these four Justices. The interest in having the Constitution interpreted correctly—at least with regard to the scope of a textual right—is a reliance interest. Getting the "right answer" is a reliance interest.

And just like that, all *four* factors referenced in *Ramos* become various measuring sticks for correctness. After all, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows

---

[141] *Gamble*, 139 S. Ct. at 1988 (Thomas, J., concurring) (quoting THE FEDERALIST NO. 78, at 599 (Alexander Hamilton) (Sweetwater Press 2010)).

[142] *Ramos*, 140 S. Ct. at 1425 n.1 (Thomas, J., concurring in the judgment).

[143] *Gamble*, 139 S. Ct. at 1986 (Thomas, J., concurring).

[144] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458 (2015).

[145] Feldman, *supra* note 136.

[146] *Ramos*, 140 S. Ct. at 1405 (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1489 (2019)).

[147] *Id.* at 1405–07.

[148] *Id.* at 1406.

[149] *Id.* at 1408 (plurality opinion) (emphasis added).

to be true."[150] Nearly everyone *knows* that *Apodaca* was incorrect—including at least eight of the nine Justices on the Court at the time.[151] So, the majority concludes, the only defensible conclusion is that *Apodaca* must go. By placing emphasis on "the reliance interests of the American people," the Court adopts a position very similar to Justice Thomas's—wrongness is paramount to the analysis.[152]

Justice Kavanaugh's concurrence stakes out a position more toward the middle of the Thomas-to-Kagan wrongness spectrum. Justice Kavanaugh appears to separate the threshold finding of wrongness from the *egregious* wrongness that might count against a precedent in the final analysis. Repeatedly, this concurrence refers to "overrul[ing] erroneous precedent."[153] But while a "garden-variety error" may be enough to initiate the stare decisis analysis, it "does not suffice to *overrule*" a precedent.[154] Justice Kavanaugh's observations thus provide a principled alternative in between Justice Kagan and Justice Thomas. Wrongness matters, but only if it's egregious. And we still must look at other factors.

Where the controlling opinion is preoccupied with wrongness even while it pays lip service to counterbalances like reliance, Justice Kavanaugh attempts to shine some light into the stare decisis black box. Still, his proposal has shortcomings. By trying to separate out "wrongness" factors and "negative effects" factors to be weighed against reliance, this framework admittedly engages in some double counting.[155] Workability, for example, counts against a precedent as evidence of its wrongness and also as evidence of its subsequent negative effects.[156]

Whatever the answer may be, it is clear that the Court has not coalesced around a consistent approach to factor wrongness into the calculus. We can almost certainly expect shifting approaches and alignments when the Court issues its decision in *Dobbs*. Most everyone seems to admit that *Roe* and *Casey* were wrong when they were

---

[150] *Id.* at 1405 (majority opinion).

[151] *Id.* ("Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.").

[152] *Id.* at 1408. It seems doubtful that each of the Justices in the majority would rule this way in every constitutional case. The analysis in *Ramos*—and the premium placed on a "correct" answer—was almost certainly a product of the constitutional civil liberty at stake. As I allude to in note 71, there are almost always other considerations—unstated, and often extralegal—that color these analyses. *See supra* text accompanying note 71.

[153] *E.g.*, *Ramos*, 140 S. Ct. at 1411, 1412 (Kavanaugh, J., concurring in part).

[154] *Id.* at 1414 (emphasis added).

[155] *Id.* at 1414–15 (acknowledging the overlap between the first and second considerations in the proposed stare decisis framework).

[156] *Id.*

decided.[157] How that wrongness factors into the analysis remains to be seen.

CONCLUSION

The Court has no clear, consistent methodology for approaching the questions of how to measure wrongness and how to factor it into the broader stare decisis framework. I do not expect one to emerge in *Dobbs*.

But the picture is not entirely bleak. Abortion precedent—and Justices' normative views on abortion precedent—has shaped the stare decisis doctrine for at least thirty years. It seems likely that *Dobbs* will largely settle that longstanding debate—either because it will overrule *Roe*'s central holding, or because it will further entrench that holding.[158] With that lurking monster out of the way, the Court may be poised to more soberly appraise the inconsistencies in its stare decisis doctrine and coalesce around a more consistent approach.

---

[157] *See generally, e.g.*, JACK M. BALKIN, WHAT *ROE V. WADE* SHOULD HAVE SAID (2005); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 375 (1985); Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973) ("[T]he substantive judgment on which [*Roe*] rests is nowhere to be found."); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) ("[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").

[158] It is possible the Court could circumvent stare decisis altogether by holding that the "viability line" declared in *Roe*, reaffirmed in *Casey*, was dicta. Transcript of Oral Argument at 18–20, Dobbs v. Jackson Women's Health Org., No. 19-1392 (2021) (Roberts, C.J.). That seems unlikely. *Id.* at 45 (Barrett, J.) (noting that stare decisis "is obviously the core of" *Dobbs*).

PRIVATE CONTROL OVER PUBLIC DISCOURSE

Distinguished Panelists[*]

Dean Reuter: Good morning, everyone. Let's get started if we could. Welcome back. Thank you. I'm Dean Reuter, still the Senior Vice President and General Counsel of The Federalist Society.[1] It's great to see you again. I said to somebody last night, this Federalist Society thing, it's like a great, big family reunion. Everywhere you turn, you see someone that you know, but these people you actually like.

In terms of housekeeping—I always have the housekeeping duties, so I apologize for that. But I'm reminding folks about the D.C. protocols. I've heard some grumblings about wearing the masks. It might be too late for a pro tip on making mask wearing a little less unbearable, but I soaked my mask last night in some pretty high-end scotch. And I'm rather enjoying wearing it this morning. Of course, that's not true. That's just a ridiculous joke. I've been soaking my mask in scotch since April. Really, though, please don't soak your mask in anything, especially if you're watching from home and you're not an adult.

In terms of CLE, I've covered this before, but I'll mention it again. You need to begin your day, if you're seeking CLE, with a QR code. Hopefully, everybody knows what that means. If you haven't done it, there's a QR code outside the door and in registration, and some volunteers nearby should have the code as well. But make sure you do that. Otherwise, you'll have a problem with your bar association.

So, welcome back. It was a great evening—great day yesterday, great evening yesterday. I have to say I asked Senator Cotton for a nerdy law and policy speech, and he delivered a barn-burning roast where nearly everybody got their moment on the spit. So, I thought it was highly entertaining, but we've got a great day lined up today as well. And much later today, we'll close with the 20th Anniversary Olson Lecture with Ted Olson himself. And I remember, very

---

[*] This panel was held on November 11, 2021, in Washington, D.C., at the Federalist Society's 2021 National Lawyer Convention. The panelists included: Randy E. Barnett, Patrick Hotung Professor of Constitutional Law at Georgetown University Law Center; Adam Candeub, Professor of Law and Director of Intellectual Property, Information and Communications Law Program at Michigan State University College of Law; Jane Bambauer, Professor of Law at University of Arizona James E. Rogers College of Law; and Eugene Volokh, Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. The panel was moderated by the Honorable Barbara Lagoa of the United States Court of Appeal for the Eleventh Circuit. The statements and questions have been edited for brevity and clarity.

[1] *Dean Reuter*, THE FEDERALIST SOC'Y, https://fedsoc.org/staff/dean-reuter (last visited Jan. 18, 2022).

powerfully, a very poignant inaugural lecture very clearly, mere weeks after the 9/11 terrorist attacks twenty years ago. I do look forward to hearing what Ted has to say today.

Before that, though, we have a full day of programming, much of it on public versus private power, classroom curricula and the law, cancel culture in financial services, broadband, free speech, global human rights, and a special panel of judges talking about originalism. That's a panel that in-house, as we built it, we referred to as "A Bunch of Judges," no disrespect to the judges—and a fireside chat with Vivek Ramaswamy. But we begin this morning with a showcase panel on "Private Control over Public Discussion," which of course reminds me of a story.

Now, many of you I think know that I wrote a nonfiction World War II book, and at this point my publisher contractually requires me to say the title of the book, which is *The Hidden Nazi*, which is now available in paperback.[2] And, as I like to say, people don't buy as many books as they used to, but even if you only buy five or six books all year long it should probably be five or six copies of *The Hidden Nazi***.** Anyhow, it is a page-turning thriller that describes our hunt for a particularly despicable Nazi that nobody has ever heard about.[3] And I wrote it in first person, which is an odd presentation for a nonfiction book.

I talk about in the book our research, our hunt for this evil man who had escaped justice and any historical reckoning—had done a deal, faked his own suicide, and done a deal with the Americans and survived the war.[4] So, I'm in the book. My wife LouAnne is in the book. My kids, my father, my whole family is in the book as I spin out the tale. And when I was previewing this narrative for friends and colleagues as I'm writing the book, long before it was published, everyone would say, "Dean, that's an adventure tale that ought to be a movie or an HBO series or a Netflix series," which I never tried to dispute.

So later, when I'm having dinner with my wife and our friends, I'd tease my wife. I'd say, you know, if we make a movie out of *The Hidden Nazi*, I'll probably get Ryan Reynolds to play me because we look about the same and we're the same age and the same build. And my wife heard me tell that joke one too many times, so at our next group of friends when we're meeting, I said, "I'll have Ryan Reynolds play me." And my wife said, "If you have Ryan Reynolds play you, I'll play myself." So admittedly the story's not directly on point, but it does say

---

[2] DEAN REUTER ET AL., THE HIDDEN NAZI: THE UNTOLD STORY OF AMERICA'S DEAL WITH THE DEVIL (2019).

[3] *Id.* at 1–3.

[4] *Id.* at 2–3.

a little bit about who has control in a discussion at any given moment.

So I'm now very pleased to introduce Judge Barbara Lagoa, who will moderate our showcase panel on "Private Control Over Public Discussion."[5] She is and has been since late 2019 a judge on the Eleventh Circuit Court of Appeals.[6] Before that she served with distinction on the Florida Supreme Court, having spent several years on Florida's other lesser courts.[7] She brings a unique perspective of a state appellate court judge, a state supreme court justice, and now a federal appellate court judge.[8] Judge Lagoa, the floor is yours.

Hon. Barbara Lagoa: Thank you so much, Dean. Thank you for the introduction. It is truly a pleasure to be here today, in person and not wearing a mask, to moderate this panel where we're going to be discussing private control over public discourse with a distinguished panel of experts.

The Supreme Court has called the internet "the modern public square."[9] And that's certainly true. But unlike public squares in the country's past, this modern public square in the form of digital platforms, whether social media platforms like Twitter or Facebook or search engines like Google, provide avenues for and access to historically unprecedented amounts of speech and information. And unlike public squares in this country's past, access to this modern public square is concentrated in the hands of few parties.[10] For example, while Google controls ninety percent of the market share for search engines,[11] it can suppress content by down-listing a search result or by steering users away from certain content by manually altering autocomplete results.[12] And Facebook and Twitter can also

---

[5] *See 2021 National Lawyers Convention – Public and Private Power: Preserving Freedom or Preventing Harm?*, THE FEDERALIST SOC'Y, https://fedsoc.org/ conferences/ 2021-national-lawyers-convention#agenda-item-showcase-panel-ii-private-control-over-public-discussion (last visited Feb. 13, 2022).

[6] *Justice Barbara Lagoa*, FLA. SUP. CT., https://www.floridasupremecourt.org /Justices/Former-Justices/Justice-Barbara-Lagoa (Sept. 20, 2020).

[7] *Id.*

[8] *Id.*

[9] *Cf.* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (describing social media as "the modern public square").

[10] *See* SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 6 (2020) (describing Amazon, Apple, Facebook, and Google as "the kinds of monopolies we last saw in the era of oil barons and railroad tycoons").

[11] Kirsten Grind et al., *How Google Interferes with Its Search Algorithms and Changes Your Results*, WALL ST. J. (Nov. 15, 2019, 8:15 AM), https://www. wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753.

[12] *See id.* (describing Google's ability to curate auto-complete suggestions and search results).

narrow a user's access to information and content through similar means.[13]

Indeed, Twitter under the terms of its own service agreement can remove any person from its platform, including the president of the United States, at any time for any or for no reason while allowing other public actors, such as Nicolas Maduro or Miguel Díaz-Canel, unlimited access.[14] Is that an exercise of individual liberty by the digital platform, which is a private party, or do these digital platforms wield an enormous amount of power that needs to be regulated? And if they do require regulation, what kind of regulation? And what existing legal doctrine should be applied to these privately-owned digital platforms that constitute the modern public square?

You'll hear from some of our panelists today that the answer might lie with common law doctrines, like common carrier or public accommodation doctrines, that permit regulations that limit the private platform's right to exclude.[15] I'm looking forward to a robust debate from these speakers on these issues. Each speaker will have ten minutes for an opening remark, and I'm going to hold you to it. And then we're going to follow it with a moderated discussion, and then I promise that we will open up the floor for fifteen or twenty minutes for questions from the audience.

Before we hear from the speakers, let me introduce them. I know that they don't need any introduction, but I'm going to introduce them in the order that they will be speaking. I'm going to start first with Professor Eugene Volokh. He is the Gary T. Schwartz Distinguished

---

[13] *See* Daniel Funke, *Fact Checks Are Becoming Powerful Signals on Social Media: How Should We Check Them?*, POYNTER (Apr. 26, 2018), https://www.poynter.org/fact-checking/2018/fact-checks-are-becoming-powerful-signals-on-social-media-how-should-we-check-them/ ("[F]act-checkers can review viral posts and debunk them. Facebook then limits their reach in News Feed."); Ben Collins & Brandy Zadrozny, *Twitter Bans 7,000 QAnon Accounts, Limits 150,000 Others as Part of Broad Crackdown*, NBC NEWS, https://www.nbcnews.com/tech/tech-news/twitter-bans-7-000-qanon-accounts-limits-150-000-others-n1234541 (July 21, 2020, 8:00 PM) (describing Twitter's "sweeping enforcement action [that banned] QAnon-related terms from appearing in trending topics and the platform's search feature").

[14] *Compare Permanent Suspension of @realDonaldTrump*, TWITTER INC. (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension (removing then-President Donald Trump's Twitter account for violating a "Glorification of Violence policy"), *with* Nicolás Maduro (@NicolasMaduro), TWITTER, https://twitter.com/nicolasmaduro (last visited Feb. 5, 2022), *and* Miguel Díaz-Canel Bermúdez (@DiazCanelB), TWITTER, https://twitter.com/diazcanelb (last visited Feb. 5, 2022).

[15] *See* 47 U.S.C. § 202(a) (prohibiting discrimination by common carriers); 42 U.S.C § 2000a(a) (requiring equal access in places of public accommodation); *see also infra* pp. 548–51 (laying out the common law doctrines for common carrier and public accommodation).

Professor of Law at UCLA School of Law.[16] He is an expert in First Amendment law. He is the co-founder and author of the *Volokh Conspiracy*—I'm sure many of you read that—the Libertarian and Conservative blog.[17] He is widely published, and he recently published an article titled "Treating Social Media Platforms Like Common Carriers,"[18] which is relevant to our discussion today and which I highly recommend.

Our next speaker will be Professor Randy Barnett. He is the Patrick Hotung Professor of Constitutional Law at Georgetown University Law Center.[19] Notably, among his many accomplishments, he is also the Director of the Georgetown Center for the Constitution.[20] He has published twelve books, countless journal articles, and he has a book forthcoming that he co-authored with Evan Bernick titled *The Original Meaning of the Fourth Amendment: Its Letter and Spirit*.[21] And I believe he has a book signing afterwards.

The next presenter we have is Professor Adam Candeub. He is a professor of law and Director of the Intellectual Property, Information, and Communications Law Program at Michigan State University.[22] Prior to this position he served as Deputy Assistant Secretary of Commerce for Telecommunications and Information at the Department of Commerce, as well as Deputy Associate Attorney General at the Department of Justice during the Trump administration.[23] He is also the writer of an article published last year in the *Yale Journal of Law and Technology* which is entitled, "Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230,"[24] which is a seminal piece of authorship that he wrote, and I highly recommend reading that as well.

And our last speaker today is Professor Jane Bambauer. She is a

[16] *Eugene Volokh*, UCLA L., https://law.ucla.edu/faculty/faculty-profiles/eugene-volokh (last visited Jan. 23, 2022).

[17] *See Editorial Independence*, REASON: VOLOKH CONSPIRACY, https://reason.com/volokh/editorial-independence/ (last visited Jan. 23, 2022) ("[The authors are] generally libertarian, conservative, centrist, or some mixture of these.").

[18] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021).

[19] *Randy E. Barnett*, GEORGETOWN L., https://www.law.georgetown.edu/faculty/randy-e-barnett/ (last visited Jan. 23, 2022).

[20] *Id.*

[21] *Id.*; RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (2021).

[22] *Adam Candeub*, MICH. STATE UNIV., COLL. OF L., https://www.law.msu.edu/faculty_staff/profile.php?prof=370 (last visited Jan. 23, 2022).

[23] *Id.*

[24] Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391 (2020).

professor of law at the University of Arizona College of Law.[25] She specializes in the emerging and highly important area of technology law.[26] She's written numerous journal articles,[27] has testified before Congress,[28] and "[h]er research assesses the social cost and benefits of Big Data, and questions the wisdom of many well-intentioned privacy laws."[29] Her articles have appeared in the *Stanford Law Review*, the *Michigan Law Review*, the *California Law Review,* and the *Journal of Empirical Legal Studies*.[30]

Please, let's welcome the speakers and give them a round of applause. So, without further ado, Eugene.

Prof. Eugene Volokh: All right.

Hon. Barbara Lagoa: Ten minutes.

Prof. Eugene Volokh: You got it. Is there going to be a red light?

Hon. Barbara Lagoa: Oh, yes.

Prof. Eugene Volokh: Okay. So I think I need to be speaking here because I've got the PowerPoints.

Hon. Barbara Lagoa: Ten to twelve.

Prof. Eugene Volokh: Ten to twelve. You've got it. So it's a great pleasure to be at this conference as always and talking about this subject. I want to stress there's a question mark at the end of my title,[31] and it's an important piece of punctuation here, I think, because I don't know what the right answer is here. I think it's an important question.

---

[25] *Jane Bambauer*, UNIV. OF ARIZ. JAMES E. ROGERS COLL. OF L., https://law.arizona.edu/jane-bambauer (last visited Jan. 23, 2022).

[26] *See TechLaw Faculty*, UNIV. OF ARIZ., https://law.arizona.edu/techlaw-faculty (last visited Jan. 25, 2022).

[27] *See, e.g.*, Jane Bambauer, *Other People's Papers*, 94 TEX. L. REV. 205 (2015); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014); Jane Bambauer, *Informational Libertarianism*, 105 CAL. L. REV. 335 (2017); Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461 (2015).

[28] Tracy Mueller, *Professor Jane Bambauer Testifies Before Congress on Data Privacy*, UNIV. OF ARIZ. (Apr. 5, 2019), https://law.arizona.edu/news/2019/04/jane-bambauer-data-privacy-innovation-GDPR-CCPA-senate-judiciary-committee ("[Professor Bambauer's] testimony [before the Senate Judiciary Committee] warned that new stricter privacy laws in Europe . . . and California . . . could harm innovation and consumer welfare.").

[29] *Id.*

[30] *See* sources cited *supra* note 27.

[31] Volokh, *supra* note 18 ("*Treating Social Media Platforms Like Common Carriers?*").

I spent eighty-plus pages talking about it. I'm still not sure what the right answer is, but I want to kind of air one possible approach to these social media debates just to see whether it might make sense.

This is one of those areas where I think there's been a lot of assumption that, of course, the platforms have the right—not just a right under current law but the constitutional right to choose what to include and what to exclude.[32] I think that assumption is true in some measure and in some measure perhaps not. I'd love to see what people have to say about it, both my colleagues and the academy, people in this room—lawyers, legislatures and such. So I want to start with Justice Stevens's *Citizens United* dissent.[33]

Now, I'm with the majority on *Citizens United*. I imagine most people in the audience are. My sense is most people in the legal academy and newspaper commenters and such are with the dissent. But I think what everyone might say about the majority and the dissent in *Citizens United* is that they both had very good points. They both made some very good arguments. The question is how those arguments fit within the doctrine and how you weigh the value of each. So I thought that Justice Stevens's dissenting argument is worth bringing up a bit because what it was all about is the concern with economic power being translated into political power.[34]

Now, in any free-market economy some element of that is going to be present. And I don't think Justice Stevens was radically opposed to that. Nor do I think the campaign reformers are categorically opposed to it. Nonetheless, there is, I think, real reason to worry in a democracy—even if you are a free-market sympathizer like I am—to worry about entities that are immensely, economically powerful to the level that their yearly revenue exceeds the GDP of many nations, that that power may be unduly leveraged into political influence.[35] And that's what Justice Stevens was talking about.[36]

---

[32] *See id.* at 423–24 ("Now of course requiring that material be included within a coherent speech product . . . is generally unconstitutional, not because it involves compelled hosting as such, but because it interferes with the host's own speech."); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63–64 (2006) (recognizing that speech carriers have the right to control the content of their own messages).

[33] Citizens United v. FEC, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part).

[34] *Id.* at 471.

[35] *See, e.g.*, Omri Wallach, *The World's Tech Giants, Compared to the Size of Economies*, VISUAL CAPITALIST (July 7, 2021), https://www.visualcapitalist.com/the-tech-giants-worth-compared-economies-countries/ (discussing how technology giants such as Apple, Amazon, Facebook, and Microsoft have higher market caps than most countries' GDPs).

[36] *See Citizens United*, 558 U.S. at 475 (Stevens, J., concurring in part and dissenting in part) (arguing that the majority's decision would "undoubtedly cripple the

A legislature might conclude that unregulated spending by corporations about candidates will give them unfair influence and distort public debate.[37] "The opinions of real people may be marginalized," and if we want to have "competition among actors in the political arena [be] truly competition among ideas," there needs to be some regulation to prevent that marginalization.[38] Corporate domination of electioneering can also generate the impression that corporations dominate our democracy. And politicians who fear a corporation's power here may be cowed into silence about that corporation or perhaps about those things the corporation just doesn't want them to talk about.

Now, again, I think the majority got this right because I think none of this justifies restricting the speech of corporations. Among other things, it turns out that the speech of corporations is actually a very small portion, even post-*Citizens United*, of discourse about candidates, maybe five to ten percent.[39] We don't know for sure. So I think that Justice Stevens's argument rightly didn't carry the day there. But he was talking about this is an argument for restricting corporations' speech.[40]

But I think it applies even more to questions about regulating corporations restricting individual speech. On one side there is this concern about excessive economic power, and on the other side are the free speech rights of corporations and of the people who own and run those corporations.[41] I do think the free speech rights prevail. But when on one side is this interest in—or this concern about excess economic—or use of economic power to influence politics and the other side is the corporation's ability to restrict speech, not to engage in their own speech but to restrict speech, the balance, it seems to me, may well be different.

---

ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process").

[37] *See id.* at 423 ("[T]he distinctive potential of corporations to corrupt the electoral process [has] long been recognized . . . .").

[38] *Id.* at 470 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986)).

[39] *See* KARL EVERS-HILLSTROM ET AL., MORE MONEY, LESS TRANSPARENCY: A DECADE UNDER CITIZENS UNITED 3 (2020) ("Corporations accounted for no more than one-tenth of independent groups' fundraising in each election cycle since the ruling.").

[40] *See Citizens United*, 558 U.S. at 394 (Stevens, J., concurring in part and dissenting in part) (dismissing the majority's First Amendment concerns and stating that "lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races").

[41] *Compare id.* at 447–48 (Stevens, J., concurring in part and dissenting in part) (discussing "Congress' legitimate interest" in preventing wealthy corporations from unduly influencing elections), *with id.* at 365 (majority opinion) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

Here's one way of thinking about it: let's think of platforms as places where people can speak using others' property. Let's imagine a spectrum. On one end of the spectrum may be newspapers and magazines. Newspapers and magazines often carry the speech of outsiders, letters to the editor, ads, op-eds, syndicated columns, and such. And they have not just the right to include materials—they have the right to exclude materials.[42] That's been recognized, as we'll see shortly, under the First Amendment that that's part of their editorial discretion.[43] And I think quite rightly so, in part because newspapers and magazines solve the problem of information overload.

The newspaper and magazine is valuable at least as much for what it excludes as for what it includes. There are all of these stories out there and all of these topics, important or not. The stories may be well written or not. The stories may be accurate or not. They may be intelligent or not. And we rely on newspapers and magazines to filter that for us. And I think it would be a real mistake to try to regulate newspapers and magazines for fairness or even-handedness.

Bookstores are another item that historically have been seen on that side of the spectrum.[44] They don't actually create new works.[45] They don't edit particular works, but they do select works, which is why there are such things as free-market book stores or feminist book stores or Christian book stores, which is also, I think, pretty useful as a means of dealing with information overload—that if you have a bookstore you trust, you might go there and expect that the books that they'll display for you to browse will be interesting books, well-written books, books worth reading.

And I think—actually I wrote a white paper on this wearing my lawyer hat for Google[46]—but I would also endorse this as an academic. Google as provider of search also serves that function. Whatever you may want a search to be, you don't want it to be content neutral. Imagine a content neutral search engine. I don't think you even want it viewpoint neutral. If you ask it how old the earth is, let's say, you probably want the viewpoint that is shared by the scientific community rather than whatever somebody may have search engine optimized to try to put up top.

---

[42] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974).

[43] *Id.* at 258.

[44] *See* Smith v. California, 361 U.S. 147, 150 (1959) (stating that the First Amendment protects "the free publication and dissemination of books").

[45] *See id.* (noting that, although bookstores do not create works, they still play a "significant role in the process of the distribution of books").

[46] EUGENE VOLOKH & DONALD M. FALK, GOOGLE: FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012).

Likewise, I think—with regard to platforms recommending pages you might like—that is actually very close. I think, to what newspapers or bookstores in particular do.

And the interesting question is where you put Facebook, YouTube, and Twitter managing conversations, so comments, say, by somebody on my page or on my tweet. But then, when you get down to the bottom of that, you see situations where we don't expect entities to select and edit. In fact, we forbid them from doing that. The Postal Service is an example. The Postal Service, at least since the 1940s, as it's been understood, isn't supposed to say "oh, this is good speech or this is bad speech"—perhaps setting aside some examples of actually outright unprotected speech.[47] No, the Post Office is a government-run entity, but we take the same view with regard to a phone company.[48]

Imagine a phone company says, we happen to know, not from listening in but from public information, that this phone number is being used as a recruiting number by the Klan or by Antifa or by the communists or by whoever else, and we're just appalled, and our other subscribers are appalled by our property being used for these conversations. So we're just going to cancel their phone number. That's not something they can do. They are common carriers.[49] They're not supposed to leverage their power, whether it's monopoly or monopoly-ish power as with landlines, or non-monopoly power as with famously competitive cellphone companies.[50] They're not supposed to leverage that economic power into political power, power over the discourse.[51] Likewise UPS and FedEx, if they say, we don't want to deliver from your bookstore, that's not something they're entitled to do.[52]

One question is how should we assimilate Facebook, YouTube, and Twitter as providers of hosting for users to reach willing viewers. So, somebody sets up a Twitter account, and people go there because

---

[47] *See* Hannegan v. Esquire, Inc., 327 U.S. 146, 151 (1946) (stating that censorship by the Postmaster General is "abhorrent to our traditions").

[48] Telephone companies are federally classified as common carriers. 47 U.S.C. § 153(11); *see also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2316–17 (2021) (describing telephone companies as "common carriers under federal law"). Common carriers are prohibited from discriminating based on viewpoint. 47 U.S.C. § 202(a); *see also* Lakier, *supra*, at 2317 (noting that Section 202(a) "clearly protects a number of interests that the First Amendment also protects").

[49] Lakier, *supra* note 48, at 2316–17.

[50] *See* Volokh, *supra* note 18, at 379–80, 384–85 (describing the various legal obligations for phone companies, both landline and cellular).

[51] *Id.* at 380.

[52] *See id.* at 379 & nn.3–4 (noting that UPS and FedEx, as common carriers, "can't block publications simply because they don't like the ideas expressed within them"); Mitchell v. United States, 313 U.S. 80, 94–95 (1941) (finding that federal law prohibits common carriers from discriminating based on race and requires them to provide equal access to accommodations).

they want to see it. Somebody sets up a Facebook page or puts up a YouTube video and people go there because they want to see it. Should we treat them more like newspapers and magazines that have editorial discretion which we value? Or should we treat them more like phone companies or UPS or FedEx that are supposed to provide common carriage to all?

So that's the policy thing. I want to just quickly, because I have just a couple of minutes left, talk briefly about the constitutional question, although one can talk a lot more about it. So, I want to also start with another quote. This is also from a dissent by Justice Breyer, but on this point, I think the majority would have agreed. It's from *A.I.D. v. AOSI*, the follow-up case.[53] "Requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do."[54]

So I've often heard the argument, well, obviously, it would be an unconstitutional speech compulsion to require a property owner to host other speech. I don't think that's right. I mean, the phone companies aren't like that. That is to say, the phone companies are required to host speech but are not seen as having a First Amendment right to say, "No, we're going to cancel someone's phone line."[55] So again here you can see a spectrum. Newspapers can't be required to publish replies to criticism of candidates because, again, they have constitutionally protected editorial discretion.[56] A parade organizer can't be required to include floats it dislikes in its parade because when people go to see a parade, the parade is seen as the aggregate of all the messages.[57] People often watch it beginning-to-end, or at least some point to another point.

On the other hand, a shopping mall may be required to allow leafleteers and signature gatherers, including leafleteers who distribute offensive material or material that urges a boycott of stores in that very shopping mall.[58] That's an interesting question as to whether that's a good rule. Remember that question mark at the end of my title. Maybe shopping malls shouldn't be regulated this way, but

---

[53] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S.Ct. 2082, 2090 (2020) (Breyer, J., dissenting).

[54] *Id.* at 2098.

[55] *See* Lakier, *supra* note 48, at 2316–17 (describing the consumer's protection from censorship by telephone companies under current law).

[56] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247, 258 (1974).

[57] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572–73 (1995).

[58] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980); Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742, 750 (Cal. 2007).

the Supreme Court has said that, if a state wants to impose this rule, that's constitutional.[59]

Cable systems may be required to broadcast channels[60], and, of course, in *Rumsfeld v. FAIR*, a university may be required to allow military recruiters.[61] And by the way, not just as a condition of funding, which is what happened in *Rumsfeld v. FAIR*, but just as a categorical rule, which is something that the Court told us in *Rumsfeld v. FAIR* would be permissible.[62] And the distinction that is offered in some of these cases is why, for example, is a cable system different from a parade? "[T]he programming offered on various channels by a cable network . . . consist[s] of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."[63] I think that's very much descriptive of what Facebook or Twitter or YouTube is like with respect to the millions or billions of items available there.

I'm going to close with just kind of one point. I think as a constitutional matter at least requiring common carriage just as a hosting function is consistent with the First Amendment. The big question mark for me is as to the policy matter. It's hard to imagine regulation that doesn't have the opportunity to make things worse. And this is an area where in fact regulating things might make things worse.[64] I'm far from certain that trying to impose this common carriage obligation is a good policy idea. But I do think it's probably constitutional if done right, and it's something that we ought to be thinking about.

Hon. Barbara Lagoa: Thank you. I am very impressed. You had 15 seconds left.

Prof. Eugene Volokh: I'm going to save that for rebuttal, Your Honor.

Hon. Barbara Lagoa: Randy, you want to take his fifteen seconds?

---

[59] *PruneYard Shopping Ctr.*, 447 U.S. at 87–88.

[60] Lakier, *supra* note 48, at 2317–18 n.83 (describing how communications companies are prohibited from discriminating); 47 U.S.C. § 153(11).

[61] Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 70 (2006).

[62] *Id.* at 59–60 (stating that a funding condition that could be imposed directly is constitutional); *see also* Volokh, *supra* note 18, at 415 (explaining *Rumsfeld*'s holding).

[63] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 576 (1995).

[64] *See, e.g.*, Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring) (explaining how history demonstrates that regulating the press is ill-fated).

Prof. Randy E. Barnett: I'll take his fifteen seconds. I'll need it. Until the 1950s, when African Americans traveled in the South, they were so restricted in the hotels and restaurants that would serve them that they bought "The Green Book," a guide to hotels and other services who would do business with them.[65] This was, at best, an imperfect, private solution to a serious public problem.

Through a combination of state laws, private prejudice, and private violence, combined with a lack of government protection, a vital national privilege of African American citizens was being abridged. It was the privilege known as the right to travel.[66] Tragically, this abridgement had been made possible by decisions of the United States Supreme Court.[67]

To combat the organized white supremacy that arose in the wake of slavery's abolition, Republicans in the 39th Congress enacted the Fourteenth Amendment.[68] Then, in 1875, they used the enforcement power of Section 5 to prohibit just this type of discrimination in nongovernment-owned places of public accommodation.[69]

But eight years later in the *Civil Rights Cases*, the Supreme Court held the 1875 civil rights law to be unconstitutional on the grounds that it barred discrimination by nongovernmental actors.[70] The regime of organized white supremacy lasted for ninety years until the Civil Rights Act of 1964 in which Congress once again barred discrimination in places of public accommodations.[71]

It was this law and the subsequent federal enforcement that finally broke the back of Jim Crow.[72] Because of its precedent in the *Civil Rights Cases*, however, the Court upheld the 1964 Act based on Congress's commerce power, rather than on its Section 5 power, to

---

[65] VICTOR H. GREEN, THE NEGRO MOTORIST GREEN-BOOK 1 (1940 ed. 1936).

[66] *See Traveling Through Jim Crow America*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE (July 23, 2018), https://nmaahc.si.edu/explore/stories/traveling-through-jim-crow-america (explaining that Jim Crow laws, threats, and humiliation made it difficult and dangerous for African Americans to travel).

[67] *See* The Civil Rights Cases, 109 U.S. 3, 10, 25–26 (1883) (holding the Civil Rights Act of 1875, which made it illegal to draw a distinction among citizens of different races or colors in places of public amusement, to be unconstitutional and void).

[68] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70–71 (1873).

[69] *See The Civil Rights Cases*, 109 U.S. at 10–11 (proposing that Congress' power to enact the Civil Rights Act of 1875 is found in Section 5 of the Fourteenth Amendment).

[70] *See id.* at 17–18 (holding that the Fourteenth Amendment did not permit Congress to restrict private discrimination in the same way that it could restrict discrimination by a state).

[71] Congress passed the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a).

[72] CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW 102 (2020); United States v. Johnson, 390 U.S. 563, 566 (1968).

ensure the equal protection of the privileges or immunities of citizenship.[73]

The Civil Rights Act of 1964 passed with a higher percentage of Republican than Democrat support in both the Senate and House.[74] Without that support, the Act would have died. Yet some Republicans, most prominently Senator Barry Goldwater, objected to its constitutionality because it barred discrimination by privately owned businesses.[75] Republicans have been tarred by this association ever since. In 1875, of course, it was Democrats, not Republicans, who raised this constitutional objection.[76] Understanding why the Republican majority that passed the 1875 act thought it was constitutional is useful today.

In our book, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, Evan Bernick and I spend two chapters explaining the concept of republican citizenship embodied in Section 1 of the Fourteenth Amendment.[77] To understand the privileges of republican citizenship, we must distinguish between two binaries: the public-private binary and the government-nongovernment binary.[78] It is commonly assumed that these two binaries are identical. By this I mean there exist just two categories: public-governmental on the one hand and private-nongovernmental on the other.[79]

Once we distinguish them as two distinct binaries, however, we can see how the newly formed Republican Party could see not just two but three categories.[80] In between the categories of public-governmental and private-nongovernmental is the category of public-

---

[73] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261, 279 (1964).

[74] *HR. 7152. Passage.*, GOVTRACK.US, https://www.govtrack.us/congress/votes/88-1964/s409 (last visited Mar. 9, 2022) (showing that, in the Senate, 81% of Republicans voted in favor while only 68% of Democrats voted in favor); *H.R. 7152. Civil Rights Act of 1964. Adoption of A Resolution (H. Res. 789) Providing for House Approval of the Bill as Amended by the Senate*, GOVTRACK.US, https://www.govtrack.us/congress/votes/88-1964/h182 (last visited Mar. 9, 2022) (showing that, in the House, 79% of Republicans voted in favor while only 62% of Democrats voted in favor).

[75] Louis Menand, *He Knew He Was Right: The Tragedy of Barry Goldwater.*, NEW YORKER (Mar. 26, 2001), https://www.newyorker.com/magazine/2001/03/26/he-knew-he-was-right.

[76] BARNETT & BERNICK, *supra* note 21, at 185, 187–88 (demonstrating how Republicans, not Democrats, opposed discriminatory laws during discussions leading up to the Civil Rights Act of 1875).

[77] *Id.* at 82–85, 101–02 (explaining the concept of Republican citizenship in relation to the Due Process Clause in the Fourteenth Amendment).

[78] *Id.* at 24.

[79] *Id.* at 231.

[80] *Id.* at 24, 231.

nongovernmental.[81] In this category can be found the common law governing inns and common carriers.[82]

After the Fourteenth Amendment, this category sometimes went by the label "businesses affected with a public interest."[83] Unlike purely private, nongovernmental actors, such businesses could be subject to price controls and to a nondiscrimination norm.[84]

The boundaries of this middle category, whatever it be called, were not always easy to discern. And there are different ways to conceptualize and justify it. Sometimes these privately owned companies receive public charters.[85] Sometimes they exercise the power of eminent domain.[86] Sometimes they could be viewed as a monopoly.[87] Sometimes, while not individually a monopoly, through a mixture of common prejudice reinforced by private violence, they would have the practical power of a single monopoly.[88]

This is what African Americans confronted when they traveled through the South before 1964: a phalanx of nongovernmental public service providers refusing to sell them the essential means to travel within a whole swath of the United States.[89] Many of these providers were motivated by bigotry.[90] Some were just obeying the law. Still others were coerced by the threat of violence by private actors who were given free rein by local law enforcement officials.[91]

---

81 *Id.* at 231. There is also a fourth category: private-governmental. This category would include, for example, government offices and military installations. Thus, there is a grid. But this last category is not relevant to my present purpose.

82 *Id.* at 185, 232 (asserting institutions that serve the general public, such as inns and common carriers, belong in the public-nongovernmental category).

83 Nebbia v. New York, 291 U.S. 502, 536 (1934); *see also* Tyson & Brother v. Banton, 273 U.S. 418, 428, 438 (1927) (explaining the origins of private properties or businesses "affected with a public interest"). This category eventually broke down completely and I am not proposing reviving the doctrines that led to its eventual demise.

84 *Tyson*, 273 U.S. at 438; Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1266 (2014).

85 BARNETT & BERNICK, *supra* note 21, at 230.

86 *Id.*

87 Epstein, *supra* note 84, at 1258.

88 *See id.* at 1288 (elaborating how a public institution may operate as a monopoly although not individually a monopoly).

89 Maegan K. Monahan, *The Green Book: Safely Navigating Jim Crow America*, 20 GREEN BAG 2D 43, 43–44 (2016).

90 *See id.* at 44–45 (stating that the Green Book was used from 1936 to 1967 when prejudice against African Americans was widespread).

91 *See* Plessy v. Ferguson, 163 U.S. 537, 540–41, 551–52 (1896) (stating that state segregation laws required separate accommodations on the basis of race); Jhacova Williams & Carl Romer, *Black Deaths at the Hands of Law Enforcement Are Linked to Historical Lynchings*, ECON. POL'Y INST. (June 5, 2020, 2:42 PM), https://www.epi.org/blog/black-deaths-at-the-hands-of-law-enforcement-are-linked-to-historical-lynchings-u-s-counties-where-lynchings-were-more-prevalent-from-1877-to-1950-have-

Whatever their motivations, this regime of public governmental and public nongovernmental actors was able to restrict the means by which African Americans could exercise a fundamental privilege of national citizenship: the right to travel.

In describing this history, I do not mean to be equating the current situation of today's political dissenters from progressive orthodoxy with that of African Americans during Jim Crow. Still, the conceptual categories that explain why the Republicans believed that their 1875 civil rights law was constitutional may be useful to appreciate the challenge posed today by privately owned social media companies.

Let us begin with the nature of the right that is at issue. As we explained in our book, the privileges or immunities of citizens of the United States are *civil rights*. Civil rights are the rights that persons receive from the government when they leave the state of nature to enter into civil society to better secure their pre-existing natural rights.[92] In the words of the Declaration, it is "to secure these rights" that one leaves the state of nature to enter a civil society.[93] In return for their allegiance, the government owes every citizen a duty to protect these fundamental rights.[94] This duty of protection is expressly enshrined in the Equal Protection of the Laws Clause.[95]

In sum, civil rights are the government guarantees of our natural rights, along with any other rights that are necessary to protect these rights, such as, for example, the right of trial by jury, which Madison said was "as essential to secure the liberty of the people as any one of the pre-exist[ing] rights of nature."[96] The right to travel was considered to be a privilege or immunity of national citizenship in 1868 and is so still considered today.[97]

---

more-officer-involved-killings/ ("[A]s many as 75% of historical lynchings 'were perpetrated with the direct or indirect assistance of law enforcement personnel.' Despite drawing attention from large crowds, many perpetrators of historical lynchings were never charged with a crime . . . .").

[92] BARNETT & BERNICK, *supra* note 21, at 199.

[93] *Id.* at 50, 169 (explaining that persons under a government are able to receive protection for their individual rights); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. . . .").

[94] BARNETT & BERNICK, *supra* note 21, at 22–28.

[95] U.S. CONST. amend. XIV, § 1.

[96] 1 ANNALS OF CONG. 454 (1789) (Joseph Gales ed., 1834); Jeffrey Rosen & David Rubenstein, *The Declaration, the Constitution, and the Bill of Rights*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/white-papers/the-declaration-the-constitution-and-the-bill-of-rights (last visited Feb. 6, 2022).

[97] Saenz v. Roe, 526 U.S. 489, 501–02 (1999); Akhil Reed Amar & John C. Harrison, *The Privileges or Immunities Clause*, THE NAT'L CONST. CTR., https://

The freedom of speech is another well-recognized privilege of U.S. citizenship that was protected by the Privileges or Immunities Clause from being abridged by state laws.[98] The First Amendment recognizes a civil right of freedom of speech, which corresponds to the natural right we possess against our fellow citizens.[99] Contrary to the *Civil Rights Cases*, the Equal Protection of the Laws Clause imposes a duty on state governments to protect this fundamental civil right from being infringed not only by states but also by non-state actors.[100] When states fail to provide this protection, Congress can exercise its Section 5 powers to fill that gap.

This now brings us to privately owned social media platforms.[101] Just as privately owned restaurants and hotels are public accommodations reached via government owned highways, privately owned social media platforms might be considered public accommodations or common carriers—and I stress *might* be considered—that are accessed through the internet.

Just as no one is compelled to open a restaurant or hotel to the public, no one is compelled to create a public forum for the expression of speech. It is to their credit that privately owned companies like Facebook and Twitter have successfully created a communications platform that is so user friendly, it has become as essential to exercising the fundamental privileges of freedom of speech as privately owned restaurants and hotels are to the privilege of traveling. By virtue of their market success, these speech platforms might be viewed as being in that middle category of nongovernmental public institutions. Such institutions are typically regulated by the states.

For example, the District of Columbia's public accommodations law makes it unlawful "[t]o deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations . . . wholly or partially [for] a discriminatory reason based on the actual or perceived . . . *political affiliation* . . . of any individual."[102] All it would take for a state to extend this nondiscrimination prohibition to social media platforms would be to

constitutioncenter.org/interactive-constitution/interpretation/amendmentxiv/clauses/704 (last visited Jan. 22, 2022).

[98] Amar & Harrison, *supra* note 97; U.S. CONST. amend. XIV, § 1.

[99] Frederick Douglass & Kurt T. Lash, *Frederick Douglass's Plea for Freedom of Speech in Boston* (Aug. 21, 2019), https://lawliberty.org/frederick-douglass-plea-for-freedom-of-speech-in-boston/ (explaining that freedom of speech is a natural right that may not be compelled); U.S. CONST. amend. I.

[100] Marsh v. Alabama, 326 U.S. 501, 508–09 (1946).

[101] VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 5, 25 (2019); U.S. CONST. amend. XIV, § 5.

[102] D.C. CODE § 2-1402.31(a), (a)(1) (2022) (emphasis added).

define a social media platform that is open to the general public as a "place of public accommodation" and then add political *viewpoint* to the list of improper bases for exclusion.

Recognizing the right to express oneself on political issues as a privilege of national citizenship protected by the First and Fourteenth Amendment is easy. More challenging is whether to define social media platforms as places of public accommodation. For example, the Civil Rights Act of 1875 distinguished between public inns and private boarding houses, which were owner-occupied.[103] Like boardinghouses, truly private networks—for example the Georgetown law professors or the Federalist Society listservs—are not places of public accommodation. But the universal nature of social media companies seems to place them on the public accommodation side of the line.

Instead of thinking of them as nongovernmental public *accommodations*, however, perhaps it would be clarifying to label them nongovernmental public *forums*. Unlike the pages of newspapers or radio and television programs, social media "platforms" are forums that are open to members of the general public to express their views.[104]

How may such nongovernmental public forums properly be regulated? The label suggests that First Amendment doctrine now governing government-provided public forums might provide doctrinal guideposts. An online, public nongovernmental forum can certainly limit the subject matter of discussion. Subject matter regulation is a form of content regulation, but a permissible one.[105] A forum devoted to rock climbing can exclude posts on rock music. Such a forum would, in short, be considered a limited public nongovernmental forum.[106]

What about other forms of speech, say, speech that harasses another member of the forum? I suggest that, to the extent a private company has created a forum for the public to communicate their ideas, such a company is limited to barring speech that the Supreme Court has found to be unprotected from government restriction.[107] If a government provided public forum cannot restrict such speech, then neither can a non-governmentally provided public forum.

---

[103] The Civil Rights Cases, 109 U.S. 3, 40 (1883) (Harlan, J., dissenting).

[104] *Cf.* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 130–31 (2001) (Stevens, J., dissenting) (discussing public forums with regard to public entities); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993).

[105] *Good News Club*, 533 U.S. at 106.

[106] BARNETT & BERNICK, *supra* note 21, at 231–32.

[107] *Cf.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (mem.) (2021) (Thomas, J., concurring) ("Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.").

Categories of unprotected speech include fraud,[108] incitement to imminent lawlessness,[109] personal threats of violence,[110] or other unlawful harassment,[111] obscenity,[112] and child pornography.[113] Just as government can ban these forms of speech, so too can nongovernment public forums.

First Amendment doctrine also includes criteria for regulating the time, place, and manner of speech in government-provided public spaces like parks and streets. This doctrine might usefully be applied to the public forums provided by social media platforms. Such doctrines bar viewpoint-based regulations of speech. Nongovernment public forums would be able to limit messages to the communication of ideas and be free to ban commercial advertising and sexual content that is not obscene—just as government may prohibit such activities in public parks.

In developing this theory, we must not forget that nongovernment public accommodations are barred only from discriminating among members of the general public in providing access to their services. Private businesses are otherwise free to operate as their owners see fit, So too would nongovernmental public forums. Being in the middle category does not mean a business is subject to all the restrictions that are applied to government provided goods and services.

We often hear the First Amendment doesn't apply to private parties.[114] However, in this sense, perhaps First Amendment doctrine should apply to private parties who have chosen to create a *public* forum.[115] A government duty to protect the freedom to speak in nongovernmental public forums does not, however, entail a power to compel people to speak.[116] Facebook is free to express its own corporate opinions and cannot be compelled to endorse any particular idea.

---

[108] United States v. Alvarez, 141 U.S. 709, 718–19 (2012).

[109] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[110] Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[111] VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).

[112] Miller v. California, 413 U.S. 15, 24 (1973).

[113] New York v. Ferber, 458 U.S. 747, 764 (1982).

[114] *See*, *e.g.*, Julie Horowitz, *The First Amendment, Censorship, and Private Companies: What Does "Free Speech" Really Mean?*, CARNEGIE LIBR. OF PITT. (Mar. 9, 2021), https://www.carnegielibrary.org/the-first-amendment-and-censorship/ (stating that the First Amendment applies to government actors, but not to private citizens).

[115] BARNETT & BERNICK, *supra* note 21, at 34, 353 (proposing that the Equal Protection Clause should apply against private actors).

[116] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *see also* Gay Rts. Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ., 536 A.2d 1, 21 (D.C. 1987)

But unlike other companies, including most media companies, Facebook provides members of the public with a space or forum in which to express their views, which is exactly what draws the public in to view the advertising and provide the personal data from which Facebook derives much of its income.[117] If this qualifies Facebook as a common carrier, a place of public accommodation, or a "nongovernmental public forum," then it may not discriminate against speakers on the basis of their political identity or viewpoint.[118] It may only *prohibit* unprotected expression or *regulate* time, place and manner, provided it does so evenhandedly.[119]

Conservatives and Libertarians rightly oppose much governmental restrictions on how private companies do business.[120] They also rightly oppose governments regulating the speech that can be conveyed on social media platforms, for which the left is now pushing in Congress.[121] But Conservatives and Libertarians also rightly love the First Amendment that protects the natural right of freedom of speech.[122]

Viewing nongovernmental social media platforms as public forums does not justify the government suppressing constitutionally protected speech on those platforms. It is Orwellian to equate

---

(holding that a state statute could not require a private actor to compel speech about another private actor's beliefs without violating free exercise and free speech rights).

[117] Mike Isaac, *Facebook's Profit Surges 101 Percent on Strong Ad Sales.*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com.2021/07/28/business/facebook-q2-earnings.html.

[118] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (analogizing digital platforms to common carriers and suggesting that digital platforms should be subject to the same regulations as common carriers).

[119] KILLION, *supra* note 111 (citing R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992)).

[120] *See Libertarianism vs. Conservatism*, THE HERITAGE FOUND. (Aug. 9, 2018), https://www.heritage.org/event/libertarianism-vs-conservatism (stating that both political parties favor a limited government and free market); Timothy P. Carney, *Big Business and Big Government*, 28 CATO POL'Y REP. 10, 11 (2006); Matthew Feeney & Ryan Bourne, *All Roads Lead to Big Government: Heritage Takes on Big Tech*, CATO AT LIBERTY BLOG (Feb. 9, 2022, 10:13 AM), http://www.cato.org/blog/all-roads-lead-big-government-heritage-takes-big-tech.

[121] *See* Chris Talgo, *Big Tech's Assault on Free Speech*, THE HILL (Aug. 4, 2020, 8:00 AM), https://thehill.com/opinion/technology/510367-big-techs-assault-on-free-speech (suggesting that conservative and libertarian views on social media platforms have been "shadow ban[ned]"); Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation (proposing that social media platforms will be subject to stricter regulation under the Biden-Harris administration).

[122] *See* Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 240–41, 261–62 (2014) (explaining in depth the conservative-libertarian underpinnings throughout First Amendment jurisprudence).

protecting the freedom of speech of individuals who wish to speak on social media platforms with the suppression of speech on the grounds that both are regulations of speech.[123]

To conclude, I have not reached any final opinion on whether to regulate social media companies as public accommodations or public forums. But I do think we need to stop thinking in terms of the binaries of the public-private and government-nongovernmental. The antislavery constitutionalists and the Republicans who wrote the Fourteenth Amendment recognized the existence in civil society of three categories, not two.[124] So too do our current civil rights laws that are deemed to be sacrosanct. And so too should Libertarians and conservatives. Thank you.

Hon. Barbara Lagoa: Thank you, Randy. Next, we have Adam.

Prof. Adam Candeub: Professor Barnett's perspective, and I'm sure to be highly influential analysis of republican citizenship, as well as his discussion of the Supreme Court's opinion in the *Civil Rights Cases* moved me to recall the opinion's only dissent, which I'm sure most of you in the audience will remember. It's Justice Harlan's, one of the great dissents in American legal history.[125]

In it, Harlan argued that the federal government in fact did have the power under the Civil Rights Act of 1875 to mandate nondiscriminatory treatment, to quote the opinion, in "accommodations and facilities of inns, public conveyances, and places of public amusement."[126] As I understand Professor Barnett, he argues that equality merely within the governmental sphere is not enough for full citizenship in society and full participation in liberal democracy.[127] Rather, citizens must have the chance to engage fully in the public

[123] *See generally* Talgo, *supra* note 121 (reporting the "Orwellian" increase in the development of free speech limitations on social media platforms).

[124] BARNETT & BERNICK, *supra* note 21, at 24, 231.

[125] The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

[126] *Id.*; *see id.* at 26–62 ("If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination . . . . Congress has been invested with express power [to mandate nondiscrimination].").

[127] *See supra* pp. 551–60.

sphere as well.[128] I think Harlan's dissent has clear parallels to Professor Barnett's position.[129] To quote Harlan,

> The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens . . . . and to secure the enjoyment of privileges belonging, under [] law, to them as a component part of the people for whose welfare and happiness government is ordained. . . . To-day, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental [in] their freedom and citizenship. At some future time, it may be . . . some other race . . . .[130]

And the Harlan dissent offers important insights into the panel's topic, private control over public discussion.

First, the dissent recognizes that "corporations and individuals wielding public authority" can interfere with citizens and "rights fundamental in their freedom and citizenship," and that's precisely our question.[131] Whether Facebook, Google and Twitter's—Facebook is one of the supporters of today's event? Is that correct? Okay. Let's just focus on Google and Twitter.

So that's precisely our question, whether Google and Twitter's censoring of the Hunter Biden tapes,[132] the bizarre de-platforming and censoring of information critical to public health authorities,[133] their

---

[128] *See supra* pp. 556–60 (arguing social media platforms are analogous to businesses affected with the public interest and ought not be allowed to discriminate against certain content the government could not constitutionally regulate).

[129] *Compare* BARNETT & BERNICK, *supra* note 21, at 228–33 (endeavoring "to nail down the [Fourteenth Amendment's Privileges or Immunities] [C]lause's spirit" and noting that "Republican citizenship required equal treatment under the law—including the law governing access to institutions that were considered to be public in nature"), *with The Civil Rights Cases*, 109 U.S. at 48 (Harlan, J., dissenting) ("It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude.").

[130] *The Civil Rights Cases*, 109 U.S. at 61–62 (Harlan, J., dissenting).

[131] *Id.* at 62.

[132] *Cf., e.g.*, Shannon Bond, *Facebook and Twitter Limit Sharing 'New York Post' Story About Joe Biden*, NPR, https://www.npr.org/2020/10/14/923766097/facebook-and-twitter-limit-sharing-new-york-post-story-about-joe-biden (Oct. 14, 2020, 9:14 PM) (recounting that Twitter and Facebook mobilized to restrict access to a *New York Post* article that was based on Hunter Biden's emails).

[133] *See, e.g.*, Karen DeSalvo & Kristie Canegallo, *How You'll Find Accurate and Timely Information on COVID-19 Vaccines*, GOOGLE: THE KEYWORD (Dec. 10, 2020), https://blog.google/technology/health/accurate-timely-information-covid-19-vaccines/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+blogspot%2FMKuf+%28The+Keyword+%7C+Official+Google+Blog%29 ("Across [Google's]

targeting of competitive firms with different ideological outlook, such as Parler,[134] constitutes, to use Harlan's phrase, "corporations and individuals wielding public authority" to interfere with "rights fundamental" to "freedom and citizenship."[135]

Second, the dissent has direct application to the regulation of communications technology. One of Harlan's dissent's main arguments for the Civil Rights Act of 1875's constitutionality is that the federal government has the power to regulate common carriers in other industries affected with the public interest.[136] He concludes, I think rightly, that this common carrier power extends to the areas of the Civil Rights Act of 1875 covers, namely accommodations and facilities, inns, public conveyances, and places of public amusement.[137] And it is not surprising that the 19th century courts classified the new technologies, such as telegraphy and telephony, as common carriers.[138]

---

products, we've had longstanding policies prohibiting harmful and misleading medical or health-related content."); *COVID-19 Misleading Information Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy (last visited Jan. 21, 2022) (proscribing certain content regarding COVID-19); *see also* Jacob Siegel, *Google Censorship Is a Danger to Public Health*, TABLET (July 13, 2020), https://www.tabletmag.com/sections/science/articles/coronavirus-google-censorship-danger (recounting an example of Google censoring research regarding the efficacy of hydroxychloroquine as a COVID-19 treatment and expressing dismay "that [the] WHO—whose recommendations are as good as law on the YouTube, according to its CEO—was duped into changing world health policy"); *cf.* AMNESTY INT'L, SILENCED AND MISINFORMED: FREEDOM OF EXPRESSION IN DANGER DURING COVID-19 6–7 (2021), https://www.amnesty.org/en/wp-content/uploads/2021/11/POL3047512021ENGLISH.pdf (discussing problematic government censorship regarding COVID-19 and noting that "[f]reedom of expression is vitally important during complex public health crises like the Covid-19 pandemic, because a free flow of accurate, evidence-based and timely information increases awareness about health risks and how to prevent and deal with them").

[134] *See, e.g.*, Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, N.Y. TIMES, https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html (Jan. 13, 2021) (noting that Google and Apple removed Parler, an alternative social media app popular amongst conservatives, from their respective app stores, and that Amazon Web Services stopped hosting the app).

[135] *The Civil Rights Cases*, 109 U.S. at 62 (Harlan, J., dissenting).

[136] *Id.* at 37–62.

[137] *See id.* at 26–27, 58–59 ("In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.").

[138] *See* Parks v. Alta Cal. Tel. Co., 13 Cal. 422, 424–25 (1859) (concluding telegraph companies are common carriers); W. Union Tel. Co. v. Eubank, 38 S.W. 1068, 1071 (Ky. 1897) (recognizing a telegraph company as a common carrier); T. W. D., *The Law of Telegraphs and Telegrams*, 13 AM. L. REG. 193, 194–99, 194 n.1 (1865) (recounting four cases that at least implicitly considered telegraph companies as common carriers);

These courts recognized that nondiscriminatory access to communications technology was just like railroads, ferries, and inns: a vital part of citizenship.[139] The logic of Harlan's dissent supports the position that some types of social media regulation, therefore—social media is simply the telephone of the 21st century—are appropriate to maintain and strengthen our democracy.[140]

Well, then what are we talking about when it comes to social media and big tech regulation? I realize that speaking in favor of government regulation at the FedSoc national convention is not the wisest course. Libertarian lightning may come strike me down.

So let's begin with a basic principle of regulatory economics, at least as I learned it. Government should only interfere when there's a market failure.[141] With that principle, with which I think even the most ardent laissez-faireist would agree, can we justify social media regulation? Well, as a first response, I'm going to evade the question because,with regard to social media and Google, this question may not be apt. The question assumes that regulated parties are market actors that are concerned with market failure. I think it's fair to say that the large social media firms are not simply market actors, but also political actors.[142]

Indeed, no one can look at the election of 2020, the suppression of the Hunter Biden tapes, the, I would say, conspiracy against Parler,

---

Hockett v. State, 5 N.E. 178, 182 (Ind. 1886) (holding a telephone company was a common carrier akin to telegraph companies).

[139] *See Hockett*, 5 N.E. at 182 (holding that telephone companies were common carriers because, in part, the telephone "has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel of a hundred years ago, or as the steam-boat, the railroad, and the telegraph have become in later years"); *Parks*, 13 Cal. at 424–25 (noting telegraph companies must abide by common carrier obligations); W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 95, 97–100 (1901) (noting "[c]ommon carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service" and that "any difference in charge . . . as to produce an unjust discrimination" is forbidden).

[140] *See The Civil Rights Cases*, 109 U.S. at 59 (Harlan, J., dissenting) ("[N]o . . . corporation or individual wielding power under State authority for the public benefit or the public convenience, can . . . discriminate against freemen or citizens . . . .").

[141] *See* Arthur C. Brooks, *The Art of Limited Government*, 15 NAT'L AFFS. 104, 108–12 (2013) ("[L]egitimate government activity is correcting 'market failure'—specific cases in which free markets, left to their own devices, do not produce efficient outcomes. Since Adam Smith published *The Wealth of Nations*, nearly all economists have agreed that such circumstances *can* justify some degree of state intervention—not to weaken free enterprise, but to strengthen it.").

[142] *See* Adam Lamparello, *Social Media, State Action, and the First Amendment*, APP. ADVOC. BLOG (Aug. 21, 2021), https://lawprofessors.typepad.com/appellate_advocacy/2021/08/social-media-state-action-and-the-first-amendment.html (noting that, by censoring content and viewpoints, "social media platforms thwart the robust exchange of opinions and thus undermine the marketplace of ideas that is so essential to a properly functioning democracy and a diverse society").

the de-platforming of our duly elected president on Twitter, or 'Karen' platform behavior (de-platforming people who disagree with public health authorities), or the newest one, disagreeing with the so-called climate change consensus, and not see political ideology and preference playing a driving role.[143] When our country's major communications networks discriminate against the views of one half of America, this is a political failure, not simply an economic failure. And let's be honest. That one half of America against whom they're discriminating includes a lot of people in this room. I know you. I recognize you. And I would think, if trends continue, you know, you'll be de-platformed. I suspect I will.

But beyond these more partisan interests, I think there's a reason why people should be interested in this political failure. Why? Because markets depend upon the rule of law, and without democratic and functioning governmental institutions, the rule of law will erode.[144]

Second, directly responding to the question of market failure, I think there is indeed a market failure here. Now, given the number of antitrust specialists in this room, I'm a little bit hesitant to make too broad claims, but I think few would doubt that big tech platforms exercise some type of market power.[145] And many would claim that this market power is sufficient to be in violation of the antitrust laws.[146]

---

[143] *See* sources cited *supra* notes 132–134; Donald J. Trump, *Donald J. Trump: Why I'm Suing Big Tech*, WALL ST. J. (July 8, 2021, 12:31 PM), https://www.wsj.com/articles/donald-j-trump-why-im-suing-big-tech-11625761897 (expressing the opinion that Big Tech's increased censorship of content and the de-platforming of Donald Trump's social media accounts are a result of "a powerful group of Big Tech corporations that have teamed up with government to censor the free speech of the American people"); *Updating Our Ads and Monetization Policies on Climate Change*, GOOGLE (Oct. 7, 2021), https://support.google.com/google-ads/answer/11221321?hl=en (announcing new policy that "prohibit[s] ads for, and monetization of, content that contradicts well-established scientific consensus around the existence and causes of climate change"). See generally Ashitha Nagesh, *What Exactly Is a 'Karen' and Where Did the Meme Come From?*, BBC NEWS (July 31, 2020), https://www.bbc.com/news/world-53588201, for an explanation of the origin and meaning of "Karen" memes.

[144] Samuel L. Bufford, *International Rule of Law and the Market Economy – An Outline*, 12 SW. J.L. & TRADE AMERICAS 303, 303–06 (2006) (explaining the rule of law is essential for market economies because it provides the structural foundation for transactions, offers predictability, creates a mechanism for dispute resolution, and levels the playing field); Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFS. 95, 96–97 (1998) (explaining that effective governmental institutions, not those plagued with corruption, are necessary for the rule of law to succeed).

[145] *See* Marc Jarsulic, *Using Antitrust Law to Address the Market Power of Platform Monopolies*, CTR. FOR AM. PROGRESS (July 28, 2020), https://www.americanprogress.org/article/using-antitrust-law-address-market-power-platform-monopolies/ (concluding "the digital advertising businesses of Google; the social media and advertising businesses of Facebook; the App Store business of Apple; and Amazon Marketplace are protected by barriers to entry that confer market power").

[146] *See id.* ("[T]here is enough publicly available information to suggest that close antitrust scrutiny is in order for some of these firms.").

Third, we must be honest and recognize that we do not understand online behavior perfectly or even well, and that it may not obey the predictions that classical economic assumptions would make. Much research suggests the platforms use techniques to encourage addiction and to keep our eyeballs on their screens looking at their advertisements.[147] We know that social media is highly correlated with depression and mental illness, particularly for teenage girls.[148] The rate of mental illness and depression is the highest we've ever seen in our history, and it correlates very strongly with social media use.[149]

So, the choice to use social media could be like drug use, an example of hyperbolic discounting where users value a media pleasure too highly compared to subsequent disutility. And just as Odysseus asked his men to regulate him by tying him to the mast while sailing through the singing sirens, so too must we regulate ourselves when using social media. So, if I got the true Libertarians out there in the audience to the position of maybe, perhaps, possibly some type of regulation is appropriate, what would this regulation look like? Conservative advocates favor the most mild type of social media regulation, and I think this is found in the social media law—I think the best one that's passed—that of the state of Texas.[150]

---

[147] *See, e.g.*, Avery Hartmans, *These Are the Sneaky Ways Apps Like Instagram, Facebook, Tinder Lure You In and Get You 'Addicted'*, BUS. INSIDER (Feb. 17, 2018, 8:00 AM), https://www.businessinsider.com/how-app-developers-keep-us-addicted-to-our-smartphones-2018-1 (cataloging techniques used by tech platforms to retain the user's attention); Christian Montag et al., *Addictive Features of Social Media/Messenger Platforms and Freemium Games Against the Background of Psychological and Economic Theories*, INT'L J. ENV'T RSCH. & PUB. HEALTH, July 23, 2019, at 1, 4–9 (discussing several psychological factors that apps capitalize on to prolong user engagement).

[148] *See, e.g.*, Betul Keles et al., *A Systematic Review: The Influence of Social Media on Depression, Anxiety, and Psychological Distress in Adolescents*, 25 INT'L J. ADOLESCENCE & YOUTH 79, 79–82, 87–90 (2020) (summarizing thirteen studies that indicated a correlational link between social media use and depression, anxiety, and psychological distress among teenagers and noting that several studies showed social media had a more detrimental effect on teenage girls).

[149] *Id.*; TAINYA C. CLARKE ET AL., EARLY RELEASE OF SELECTED ESTIMATES BASED ON DATA FROM THE 2019 NATIONAL HEALTH INTERVIEW SURVEY 1 (2020), https://www.cdc.gov/nchs/data/nhis/earlyrelease/EarlyRelease202009-508.pdf (noting that, in 2019, 11.2% of American adults had regular feelings of worry, nervousness, or anxiety and 4.7% had regular feelings of depression); MENTAL HEALTH AM., THE STATE OF MENTAL HEALTH IN AMERICA 2020, at 8–9 (2019), https://mhanational.org/sites/default/files/State%20of%20Mental%20Health%20in%20America%20-%202020_0.pdf (noting that Major Depressive Episodes amongst youths increased from 8.66% in 2012 to 13.01% in 2017 and that the mental illnesses among adults increased from 18.19% in 2012 to 18.57% in 2017).

[150] *See* TEX. BUS. & COM. CODE ANN. §§ 120.001–.003, 120.051–.053, 120.101–.104, 120.151 (West 2021) (regulating social media activity); TEX. CIV. PRAC. & REM. CODE ANN. §§ 143A.001–.008 (West 2021) (same).

These regulations include antidiscrimination requirements of the sort which local phone, airplanes, and other common carriers function to this day without much comment or concern.[151] Under these regulations, firms cannot refuse service on the basis of race, religion, or political affiliation but must serve any customer who will accept their offered services.[152] A state could impose this type of mandate under this common carriage or public accommodation jurisdictions. There are legal issues social media—laws regulating social media presence. They've already been examined to some degree quite well by Professor Volokh and by Professor Barnett.[153] And I'm sure we'll continue that discussion in the Q&A that follows.

But as a prelude to the discussion, I will bring up a largely forgotten case but one of my personal favorites. As a communications lawyer, I guess we're entitled to somewhat idiosyncratic preferences—and that's an 1896 United States Supreme Court case, *Western Union Telegraph Co. v. James*,[154] certainly not as famous as the civil rights case. This case reviewed a claim that a Georgia law regarding delivery

---

[151] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (prohibiting censorship of "a user, a user's expression, or a user's ability to receive expression of another person based on" viewpoints); *see also, e.g.*, Hinson v. Culberson-Stowers Chevrolet, Inc., 427 S.W.2d 539, 541 (Ark. 1968) ("A telephone company is a common carrier of communications. As such it must supply all who are alike situated and cannot discriminate in favor of or against anyone."); Valdivieso v. Atlas Air, Inc., 305 F.3d 1283, 1287 (11th Cir. 2002) (holding an airline company that "offer[ed] its services indiscriminately to anyone willing to accept its terms and prices" was a common carrier).

[152] *See, e.g.*, Avinger v. S.C. Ry. Co., 7 S.E. 493, 497 (S.C. 1888) ("[I]t is a leading principle of the common law, applicable to all common carriers, that they are bound to carry for all . . . ."); Johnson v. Pensacola & Perdido R.R. Co., 16 Fla. 623, 667 (1878) (noting that a common carrier "cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same *carriage for a reasonable price, and at a reasonable charge for the service performed*"). *See generally* 13 AM. JUR. 2D *Carriers* §§ 228–29, Westlaw (database updated Feb. 2022) ("A common carrier owes a duty to the public to carry for all to the extent of its capacity at a reasonable charge and with substantial impartiality. . . . It is only discrimination that is unjust and unreasonable that is contrary to or prohibited by the common law."). Texas is not the only state to have implemented antidiscrimination regulations on social media. For example, Florida enacted similar laws. *See* FLA. STAT. ANN. § 106.072(2) (West 2021) (forbidding social media companies from deplatforming political candidates); FLA. STAT. ANN. § 501.2041(2) (West 2021) (enumerating social media practices that are outlawed as "unfair or deceptive," including not applying "censorship, deplatforming, and shadow banning standards in a consistent manner"). Likewise, other state legislatures are contemplating similar legislation. *See, e.g.*, S.F. 1253, 2021 Leg., 92nd Sess. (Minn. 2021) (proposing to outlaw social media companies from "restrict[ing], either directly, manually, or through the use of an algorithm, a user's account or content based on race, sex, political ideology, or religious beliefs").

[153] *See supra* pp. 547–51, 553–59.

[154] W. Union Tel. Co. v. James, 162 U.S. 650 (1896).

of telegraphs that could emanate from outside of Georgia but delivered within the state was unconstitutional.[155]

Western Union argued that the law interfered with the federal government's power under the Commerce Clause.[156] The Georgia law read in relevant part, "it is hereby enacted by authority of the same, that . . . every electric telegraph company . . . shall transmit and deliver [its telegraphs] with impartiality and good faith . . . ."[157] The United States Supreme Court upheld Georgia's law, and of course the First Amendment was not even considered.[158] It was a different time in First Amendment jurisprudence. The case led to widespread state regulation to ensure timely, impartial, and nondiscriminatory delivery of telegraphs.[159]

The conservative social media laws ask no more than the Georgia statute at issue in *Western Union v. James*.[160] We seek to have messages impartially delivered. It seems to me what made sense in 1896 still makes sense today. Thank you.

Hon. Barbara Lagoa: Thank you, Adam. Thank you. And last we have Jane, who's going to be the contrarian.

Prof. Jane Bambauer: Yes, I am here to defend the status quo. It's a dirty job. I'll do my best. I also reserve the right to change my mind. It sounds like we're all saying some version of this, that none of us are totally sure what is best in this. We're in a real pickle. But still, I don't see sufficient reason for lawmakers to interfere with Facebook or Twitter or any other social media company when they remove content or even users for their platforms.

---

155 *Id.* at 653.

156 *Id.*

157 *Id.* at 651 (quoting Reception and Transmission of Telegraph Dispatches, 1887 Ga. Laws § 1, 111).

158 *Id.* at 658–62.

159 *See*, *e.g.*, W. Union Tel. Co v. Crovo, 220 U.S. 364, 372, 367 n.1 (1911) (upholding a 1904 Virginia statue which, using language similar to the Georgia statute, required every telegraph company doing business in the state to do business "promptly" and "impartially"); *cf.* Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 485 (1915) (considering an Arkansas statute which subjected "[e]very telephone company doing business in this State" to a nondiscrimination requirement).

160 *Compare James*, 162 U.S. at 651–52 (enumerating provisions of Georgia's statute which, in pertinent part, required telegraph companies to "transmit and deliver [dispatches] with impartiality and good faith, and with due diligence"), *with, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002(a) (West 2021) ("A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state.").

I am quite sympathetic to the positions that each of my colleagues has staked out so far. I'm also kind of an unlikely defender of these companies because I actually don't even use Twitter or Facebook that much. They don't give a lot of value to me in my life, and I agree they've been too deferential to the elite establishment, more liberal point of view. And it also really bothers me—there is some moral failing.

It bothers me that, a lot of the time, content is removed not because the people who saw the content on the platforms found it objectionable but because others who never received it on the platform find it objectionable that it was on the platform being enjoyed and consumed by somebody.[161] Removing content for that reason is repugnant in most circumstances, I think.

Nevertheless, I think something like a public accommodation or must-carry rule for these platforms would not only be unconstitutional, but also bad policy. First of all, I think content moderation is clearly an expressive activity, so on Eugene's chart, it is somewhere pretty high in the pecking order.[162] And that's because users of social media in their role as listeners are selecting social media platforms, in part, based on the curation and house rules of the platform.

Now, I want to be really clear. I'm not saying that content moderation is a main factor or even a very important factor that attracts people to the platform. I know that other users and the content that they're likely to see are the most important factors. I also don't mean that users want social media to have a really heavy-handed approach to content moderation. To the contrary, I think we understand that one of the more unique and valuable qualities of social media is that the users themselves have a lot of power over the type of information that they wind up seeing. They control the content by picking who they're going to follow, who their friends are, and then also passively by engaging and commenting on or liking certain content that winds up feeding into an algorithm that gives them more of that content.[163]

---

161 *See* Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 (advocating for scaling back immunity for social media platforms because "we've also learned just how much social devastation these platforms can cause" and immunity "reduce[s] their incentives to proactively remove content causing social harm").

162 *See supra* pp. 546–49.

163 *See, e.g.*, *New User FAQ*, TWITTER, https://help.twitter.com/en/resources/new-user-faq (last visited Jan. 25, 2022) ("When you follow someone, every time they post a new message, it will appear on your Twitter Home timeline."); *How News Feed Works*, FACEBOOK, https://www.facebook.com/help/1155510281178725/?helpref=hc_fnav (last visited Mar. 10, 2022) (describing how Facebook personalizes individual users' News Feeds by taking account of things such as frequency of interactions with certain posts, friends, or pages; the types of post users interact with; the popularity of friends' posts and shares; and recency).

Nevertheless, we do outsource some of the preliminary editing work that has to be done to maintain some minimum standard of decency on any platform. And these minimum standards are important. They're the reasons that all of us, or at least most of us, aren't on 8chan, right? To give a sense of how important these are, keep in mind that even small changes in the newsfeed algorithm on Facebook or Twitter winds up causing big differences in how long and how much people engage with the platform.[164]

Now, I know the term "engagement" has come to have a pretty negative connotation in the anti-tech media portrayal as if engagement is something that's extracted involuntarily from people.[165] Adam alluded to this a little bit. It may be true to some extent, but on the other hand, every expressive media is trying to engage listeners and will go to some lengths of manipulation, somewhere in the scale of manipulation, to do so. To me, the fact that Facebook users are quite sensitive to the curation choices and content moderation choices of a

---

[164] *See*, *e.g.*, Kirsten Smith, *What's up with Instagram? How Recent Changes Impact Your Engagement*, HURRDAT MKTG. (Oct. 16, 2020), https://hurrdatmarketing.com/digital-marketing-news/whats-up-with-instagram-how-recent-changes-impact-your-engagement/ (attributing reduced user engagement with brands and influencers in part to changes Instagram made to its algorithm); *see also* Knowledge@Wharton & Kartik Hosanagar, *Who Made That Decision: You or the Algorithm?*, WHARTON UNIV. OF PA. (Mar. 25, 2019), https://knowledge.wharton.upenn.edu/article/algorithms-decision-making/ (statement of Kartik Hosanagar) ("[Algorithms] have a huge impact on decisions we make. . . . [A] third of your choices on Amazon are driven by recommendations. Eighty percent of viewing activities on Netflix are driven by algorithmic recommendations. Seventy percent of the time people spend on YouTube is driven by algorithmic recommendations. . . . We might see less than 0.01% of any [Google] search results, because rarely do we even cross page one."); Filippo Menczer, *Here's Exactly How Social Media Algorithms Can Manipulate You*, BIG THINK (Oct. 7, 2021), https://bigthink.com/the-present/social-media-algorithms-manipulate-you/ ("Social media like Facebook, Instagram, Twitter, YouTube and TikTok rely heavily on AI algorithms to rank and recommend content. These algorithms . . . [aim to] maximize engagement by finding out what people like and ranking it at the top of their feeds.").

[165] *See*, *e.g.*, Katherine J. Wu, *Radical Ideas Spread Through Social Media. Are the Algorithms to Blame?*, PBS (Mar. 28, 2019), https://www.pbs.org/wgbh/nova/article/radical-ideas-social-media-algorithms/ (expressing concerns "most of these [social media] algorithms seem to revolve around one central tenant: maximizing user engagement—and ultimately, revenue"); Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them.*, WALL ST. J. (Jan. 17, 2021, 7:00 AM), https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800 ("Computers are in charge of what we see and they're operating without transparency."); Filippo Menczer, *How "Engagement" Makes You Vulnerable to Manipulation and Misinformation on Social Media*, NIEMANLAB (Sept. 13, 2021, 9:36 AM), https://www.niemanlab.org/2021/09/how-engagement-makes-you-vulnerable-to-manipulation-and-misinformation-on-social-media/ ("Our research shows that virtually all web technology platforms, such as social media and news recommendation systems, have a strong popularity bias. When applications are driven by cues like engagement rather than explicit search queries, popularity bias can lead to harmful unintended consequences.").

platform suggests that users really are in control—listeners are in control here and that if Facebook weren't able to clean up some of the really offensive and objectionable content and people's news feeds were if not inundated or even occasionally interrupted by that content that they find obnoxious or indecent, they would leave. Or they would at least spend much less time on Facebook.

That means that Facebook is giving a curated speech experience. Their house rules are inconsistently enforced. They're enforced probably with bias. I agree with the panelists here. But they are still closely linked to the user's taste for speech, taste for some minimum quality standard for speech. And that makes it more like a parade organizer or a bookstore, I think, than some of the other analogies. By the way, I also do think that Facebook and Twitter do a lot of curation and censorship based on concerns related to safety, to societal harm rather than their users' taste. This too might be expressive. I think I take quite a different read of *PruneYard*—and maybe I'll put a pin in that. And we can talk about it a little bit. But I think that can help explain why public accommodations law would not forbid Facebook or any other platform from removing speakers who are engaged in speech on their platform that they find harmful.

Second, if you agree with me that platforms' curation decisions are at least to some extent expressive, then it means that a legal mandate to carry messages that they don't otherwise want to carry could only be justified if listeners or users are basically locked into one speech platform to the exclusion of other either existing or potentially future platforms.

Courts are comfortable occasionally requiring speech platforms to host disfavored speakers, but that only happens when the court is convinced that listeners are only going to encounter a particular type of media in one place.[166] It explains why a company town, for example, has to be a venue for disfavored speakers or a licensed radio broadcaster—why they would have to come under some legal obligation to provide access to speakers. It might seem like Facebook and Twitter *have* locked in their users sufficiently, especially because the Court

[166] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77, 85–88 (1980) (upholding state statute which compelled the owner of a shopping center to allow political "expression and petition" on the premises); Turner Broad. Sys. v. FCC, 520 U.S. 180, 185, 224–25 (1997) (upholding a "must-carry" provision requiring cable companies to carry local broadcast stations); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 51, 59–60, 63–65, 70 (2006) (upholding statute that required law schools to host military recruiters); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting) ("Requiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do.").

seems willing to acknowledge that lock-in effects can be behavioral or even irrational.[167]

Turner Broadcasting was a case where the Supreme Court decided that cable has to carry local broadcasting, and the reason was that they thought that it would be unlikely that people would physically change a plug in the back of their TV to switch from cable to local broadcast and then switch it back.[168] If that was enough for the *Turner* Court, it seems that having all of your family and friends in one place on Facebook and having a profile that you've already invested a lot of time in with pictures and content and whatnot, that probably will feel like you're pretty locked into Facebook. I don't think that's enough though.

I have to admit that I'm just not totally convinced that *Turner* and *Redline* hang together with other better-reasoned cases like *Tornillo*, so you can take this with some grain of salt. But there are all sorts of inertia and sunk costs that affect speakers and listeners. So those who subscribe to the *New York Times* are just not likely to ever bother checking out other newspapers, especially if they haven't seen content that they object to on the *New York Times*.[169] And yet, no court would intervene on the basis that they're locked in.

That is enough in my mind to already raise doubts, that even if Facebook locks in its users, that still might not be enough on its own to justify a mandate. But in any case, Facebook doesn't lock in its users. Here I disagree with Adam. It's not in a position where it can rest on its dominance. The users discipline Facebook all the time, and Twitter too, not by leaving altogether in a noisy protest, but rather just by

[167] *See Turner Broad. Sys.*, 520 U.S. at 219–21 (noting that "Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings *and lack of consumer acceptance* (emphasis added)). *See generally* Markus Eurich & Michael Burtscher, *The Business-to-Consumer Lock-in Effect* (Univ. of Cambridge: Cambridge Serv. All., Working Paper 2014) ("The lock-in effect refers to a situation in which consumers are dependent on a single manufacturer or supplier for a specific service, and cannot move to another vendor without substantial costs or inconvenience.").

[168] *Turner Broad. Sys.*, 520 U.S. at 224–25; *see id.* at 217–21 (rejecting appellants' contention that input selectors or A/B switches provided an adequate less restrictive means for several reasons, including evidence that suggested very few people used them and they caused technical difficulties).

[169] *See* AMY MITCHELL ET AL., THE MODERN NEWS CONSUMER: NEWS ATTITUDES AND PRACTICES IN THE DIGITAL ERA 12–13 (2016), https://www.pewresearch.org/journalism/2016/07/07/loyalty-and-source-attention/ (reporting that over half of Americans feel "loyal to their news sources," that "76% of Americans . . . usually turn to the same sources for news," and that 46% of Americans are "very loyal," meaning they both feel loyal and routinely go to the same sources); Paul Hague, *Loyalty – How to Win Devotion from Your Customers*, B2B INT'L, https://www.b2binternational.com/publications/customer-loyalty/ (last visited Feb. 7, 2022) (discussing customer loyalty research and noting that "[c]ustomers defect for two primary reasons: their need for a product or service has ceased, or the product/service they are buying has failed to satisfy their needs in some way").

reducing the amount of time that they spend there and choosing other online platforms or even going to do something else altogether.

If Facebook didn't reflect the values and minimum taste requirements of its users, it would lose their attention. And looking at Facebook and Twitter's behavior over the last few years, I see desperate media companies not that different from the traditional media companies who are desperately trying to figure out what their median user wants and what their edge users will tolerate or even demand in terms of censorship and promotion.[170] So those aren't the behaviors of a monopolist.

Finally—and I know I'm close to the end of my time—even if I were convinced that a must-carry rule is good policy, I don't see how it can be administrable. First of all, as Randy mentioned, a platform would be able to proactively purge illegal content. But the edges of the boundaries of what some of the categories of illegal content are really quite murky: what it means to be incitement,[171] what harassment means,[172] what material support means even.[173] These are hard to identify with certainty, and so we're likely to get a lot of litigation.

---

[170] *See, e.g.*, *Permanent Suspension of @realDonaldTrump*, *supra* note 14 (announcing the permanent suspension of former President Donald Trump's Twitter account "due to the risk of further incitement of violence"); *COVID-19 and Vaccine Policy Updates & Protections*, FACEBOOK, https://www.facebook.com/help/230764881494641 (last visited Feb. 7, 2022) (regulating COVID-19-related content "that contributes to the risk of real-world harm"); *Updating Our Ads and Monetization Policies on Climate Change*, *supra* note 143 (announcing a restrictive ad and monetization policy in the wake of "concerns about ads that run alongside or promote inaccurate claims about climate change"); Emily A. Vogels et al., *Most Americans Think Social Media Sites Censor Political Viewpoints*, PEW RSCH. CTR. (Aug. 19, 2020), https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ (discussing several metrics regarding Americans' perceptions of social media censorship and noting that "[r]oughly three-quarters of Americans (73%) think it is very or somewhat likely that social media sites intentionally censor political viewpoints they find objectionable").

[171] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[The Court's] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); Bible Believers v. Wayne Cnty., 805 F.3d 228, 244 (6th Cir. 2015) (en banc) ("It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot.").

[172] *See* Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, AM. BAR ASS'N (Oct. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/the_intersection_of_free_speech_and_harassment_rules/ (noting that while "merely offensive harassing speech *is* protected speech[,] [s]peech that rises to the level of discriminatory harassment is *not* protected speech" (emphasis added)).

[173] *See, e.g.*, Ayvaz v. Holder, 564 F. App'x 625, 627–28 (2d Cir. 2014) (considering 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) and remanding "[b]ecause the term 'material' is

But also, I just wonder about things like troll farms, the Russian Internet Research Agency, that creates overtly political content that listeners seem to want and engage with and yet are inauthentic speakers.[174] So is that something that would have to be tolerated on a platform? Spamming is another concern.[175] I think by the time we're done with this we'd have such Byzantine time, place, and manner rules on these platforms that we'd see a constant stream of litigation.

And more importantly, though, I think that they just might break the companies that we claim are the public square. If there's too much content that users don't want to see, they and the advertisers are going to move to smaller forums that are not under this regulation.[176] And so there goes the public forum. All right. Thank you very much.

---

ambiguous" and the lower tribunal did not determine if a single meal was "material support"). *Compare* Singh-Kaur v. Ashcroft, 385 F.3d 293, 298–99 (3d Cir. 2004) (affirming the Board of Immigration Appeals' determination that providing food or setting up tents could be "material support" as "not 'arbitrary, capricious, or manifestly contrary to the statute'"), *with id.* at 303–08 (Fisher, J., dissenting) ("'Material support,' by its plain language, means that the act affording support must be of a kind and degree that has relevance and importance for terrorist activity, terrorists, or terrorist organizations, and cannot be mere support."). *See generally* 8 U.S.C. §§ 1182(a)(3)(B)(i)(I), (iv)(VI) (barring admission of aliens who "engaged in a terrorist activity," which includes "to commit an act that the actor knows, or reasonably should know, affords material support"); 18 U.S.C. §§ 2339A(a)–(b)(1) (proscribing "material support to terrorists" and defining "'material support or resources'" as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials").

[174] *See* Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, MIT TECH. REV. (Sept. 16, 2021), https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election/ (defining "troll farms" as "professionalized groups that work in a coordinated fashion to post provocative content, often propaganda, to social networks," and discussing the pervasive reach of troll farms on Facebook); Jarred Prier, *Commanding the Trend: Social Media as Information Warfare*, STRATEGIC STUDS. Q., Winter 2017, at 50, 67 ("[T]he Russian minister of defense acknowledged the existence of their cyber warriors in a speech to the Russian parliament, announcing that Russia formed a new branch of the military consisting of information warfare troops. The Internet Research Agency . . . now seems to be the information warfare branch he openly admitted to. This army of professional trolls' mission is to fight online.").

[175] *See* Sanjeev Rao et al., *A Review on Social Spam Detection: Challenges, Open Issues, and Future Directions*, EXPERT SYS. WITH APPLICATIONS, Dec. 2021, at 1, 1, 3–7 (discussing how spammers' methodologies have evolved since the development of online social networks).

[176] *Cf.* Joseph A. Wulfsohn, *Conservatives Flee to Parler Following Twitter's Permanent Suspension of Trump*, FOX NEWS (Jan. 8, 2021, 9:12 PM), https://www.foxnews.com/media/conservatives-join-parler-twitter-trump-ban (cataloging notable conservatives that created Parler accounts in the wake of Trump's suspension on Twitter).

Hon. Barbara Lagoa: Thank you, Jane. Well, I think we have a lot to talk about. I think everyone has the same consensus, which is no one really knows what we should do.

Prof. Jane Bambauer: That's the one thing we agree on.

Hon. Barbara Lagoa: Now, it's interesting to me, Jane, you talked about people can go to other social platforms, but the reality is what are the other social platforms? Because Twitter is the platform for most people to communicate.[177] Then you have Google which controls ninety percent of the market share.[178] So it does become an issue, which is where does someone else go if you are de-platformed or you're canceled on Twitter?

Prof. Jane Bambauer: I personally have followed de-platformed people to Substack.[179] It's different—I get that it's not really social media. It's not social in the way these other—

Hon. Barbara Lagoa: I mean, it wouldn't be the modern public square. It would be like a little, you know, off-Broadway.

Prof. Jane Bambauer: Right. But I think the Parler experience is a really good one to focus on for a second. There are many ways and angles to view what happened in the aftermath of the great de-platforming, but the fact is fifteen million people joined Parler in a very short amount of time.[180] And right at the height of that

---

[177] *See* Ben Woollams, *Why Is Twitter Making a Comeback as One of the Most Popular Social Channels?*, DRUM (Sept. 6, 2021), https://www.thedrum.com/opinion/2021/09/06/why-twitter-making-comeback-one-the-most-popular-social-channels (explaining that Twitter popularity is increasing due, in part, to its "highly sociable and authentic" nature). *Contra* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ (reporting that Facebook and YouTube are the most used social media platforms in America).

[178] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (noting that Google search controls "90% of the market share"); Joseph Johnson, *Worldwide Desktop Market Share of Leading Search Engines from January 2010 to December 2021*, STATISTA (Jan. 26, 2022), https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/ ("Google has dominated the search engine market, maintaining a 92.47 percent market share as of June 2021.").

[179] *See generally* Chris Best & Hamish McKenzie, *A Better Future for News: Why We're Building Substack*, SUBSTACK (July 17, 2017), https://on.substack.com/p/a-better-future-for-news (explaining that Substack is a service that allows users to subscribe to writers and receive their work).

[180] *See* Kaitlyn Tiffany, *Parler's Rise Was Also Its Downfall*, ATLANTIC (Jan. 18,

momentum, Parler was stopped, but not by Facebook and not by Twitter. They were stopped by Apple and Google who control the smartphones, and they were stopped by the cloud service firms of Amazon and other cloud servers.[181]

There may be an antitrust problem there, but I think the fact that users who are upset about content moderation show such willingness to move so quickly is a sign that there is an appetite for competition here. And I know fifteen million is many fewer than the number of people who subscribed to President Trump's Twitter account.[182] I understand that. But I guess that takes me to the ultimate conclusion that part of the reason that some people won't switch to Parler is because Parler has promoted itself as a place with no or very minimal house rules.[183] That matters. I think some people will just be reluctant to go to a platform—many people will be reluctant to join a platform with no house rules.

Hon. Barbara Lagoa: I'm going to bring this to Adam. I'd like to talk to you about an amicus brief that you filed in a state court case called *Ohio v. Google*.[184] Can you discuss a little bit the facts of that case and what your amicus position is? Because, to me, it's interesting that when I read the amicus and the complaint in that case, how I think of Google just as what it does, but it really is involved and it owns part of the infrastructure.[185] It owns a lot of different things, and it's tangled

---

2021), https://www.theatlantic.com/technology/archive/2021/01/parler-ban-insurrection-trump-qanon/617718/ (recounting that Parler was founded in 2018, by December 2020 it had eleven million users, and prior to its takedown in January 2021, it had fifteen million users).

[181] Nicas & Alba, *supra* note 134.

[182] *See* Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES, https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html (Jan. 12, 2021) (reporting that prior to his account's suspension, President Trump had over eighty-eight million followers on Twitter).

[183] *See Community Guidelines*, PARLER, https://parler.com/documents/guidelines.pdf (Nov. 2, 2021) (stating that Parler "prefer[s] that removing users or user-provided content be kept to the absolute minimum" and enumerating two guiding principles: (1) "Parler will not knowingly allow itself to be used as a tool for crime, civil torts, or other unlawful acts[;]" and (2) "[p]osting spam or using bots are nuisances and are not conducive to productive and polite discourse").

[184] Amended Amicus Brief Opposing Defendant's Motion to Dismiss of Amici Claremont Institute's Center for Constitutional Jurisprudence, J.D. Vance, and D.J. Swearingen, Ohio v. Google, LLC, No. 21 CV H 06 0274 (Ohio Ct. Com. Pl. filed June 8, 2021) [hereinafter Amicus Brief in Opposition to Motion to Dismiss].

[185] *See* Complaint for Declaratory Judgment and Injunctive Relief at 2–5, 8–9, Ohio v. Google, LLC., No. 21 CV H 06 0274 (Ohio Ct. Com Pl. filed June 8, 2021) (explaining that Google is "more than just a search engine. It is a complex and multifaceted business . . . [which] monetizes through an advertising business . . . [and] engages in a range of business lines that compete with not just search engines and online

up in a lot of what we consider to be the components or how you put together the modern public square. And it's not just Google, the search engine.

Prof. Adam Candeub: Right. I think Google is the central directory for the modern economy and really our culture. That's where people go to find information and direct themselves, so I think that's a very natural and correct intuition. And the suit flows from that intuition. Once again, we're back to obscure nineteenth-century common carrier law.[186] And in many states, courts retain the power to declare firms common carriers and subject them to common carrier regulations, just the judge doing it him or herself, which you might like, Judge.[187]

Using these old cases, Attorney General Yost of Ohio brought such an action against Google, and I think he has a very good claim because Google does play that central role that the telephone, the telegraph, and the railroad played in earlier generations.[188] And that's a pretty straightforward suit.

---

advertisers, but with suppliers of information . . . . Google intentionally structures its Results Pages to prioritize Google products over organic search results . . . . As a result of [this], nearly two-thirds of all Google searches in 2020 were completed without the user leaving Google owned platforms"); Amicus Brief in Opposition to Motion to Dismiss, *supra* note 184, at 1 ("No one doubts the essential role that Google plays in our society's political, economic, and social lives. It is the centralized communications mechanism that connects voters to politicians, consumers to businesses, and church and civil groups members to each other.").

[186] *See* Amicus Brief in Opposition to Motion to Dismiss, *supra* note 184, at 3–5 (citing several cases from the nineteenth and twentieth centuries to argue that Google is a common carrier).

[187] *Id.* at 1, 5; *see, e.g.*, Huang v. Bicycle Casino, Inc., 208 Cal. Rptr. 3d 591, 598 (Cal. Ct. App. 2016) ("Whether a party is a common carrier for reward may be decided as a matter of law when the material facts are not in dispute. When the material facts are disputed, it is a question of fact for the jury." (citation omitted)); State ex rel. Bd. of R.R. Comm'rs v. Rosenstein, 252 N.W. 251, 253 (Iowa 1934) ("It is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether, under the evidence in a particular case, one charged as a common carrier comes within the definition of that term and is carrying on its business in that capacity."); Hissem v. Guran, 146 N.E. 808, 809–10 (Ohio 1925) (invalidating an act by the Ohio legislature that sought to regulate private vehicles carrying persons or property on public roads under the common carrier doctrine because the conduct did not qualify them as common carriers).

[188] Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 185, at 1, 10–11 (requesting the court to declare Google as a common carrier as allowed "under Ohio common law"); Amicus Brief in Opposition to Motion to Dismiss, *supra* note 184, at 1 ("Google is the [modern public] square's essential communications network, assuming the role that the telegraph and telephone played in earlier times."); *see* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–37 (2017) ("While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today

Hon. Barbara Lagoa: Do you think other states are going to follow suit as Ohio did?

Prof. Adam Candeub: Well, a lot depends upon the peculiarities of state law. Ohio just happened to have this common law continuance of judicial authority.[189] But there are plenty of other states—and if there are any state AGs out there who want to talk, I'm available after the panel.

Hon. Barbara Lagoa: I'm going to stay with you, Adam, for a second because I want to talk about the article that you wrote "Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230."[190] It was cited by Justice Thomas in his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*.[191] And in that concurrence he raised a possibility of treating online tech platforms as common carriers or public utilities from a constitutional regulatory perspective.[192] Can you talk to the audience, for those who are not familiar with either your article or Justice Thomas's concurrence, about where the First Amendment fault lines come into play with regard to private companies regulating user content?

Prof. Adam Candeub: Sure. The statement—and it was a statement concerning a denial of certiorari.[193] It wasn't part of an opinion. But it actually tracks very well the discussion that we're having right now. The case involved an issue concerning whether or not President Trump's personal Twitter account was a public forum.[194] And as you remember from First Amendment law, if it's a public forum,

---

the answer is clear. It is cyberspace . . . and social media in particular."); Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1224 (2021) (discussing, amongst other things, Google's prevalence in modern society).

[189] *See Hissem*, 146 N.E. at 809–10 (stating that "this court is required to determine the limitations upon the power and authority of the General Assembly to declare certain persons and firms to be common carriers, when the business conducted by them is such as not to bring them within the common-law definition of common carriers," and forbidding "a state Legislature to convert a private carrier into a public utility by mere legislative fiat").

[190] Candeub, *supra* note 24.

[191] *Biden*, 141 S. Ct. at 1222 (Thomas, J., concurring).

[192] *Id.* at 1222–24 (analogizing digital platforms to traditional common carriers which often held themselves out to the public, had a dominant market share, and extensively controlled speech).

[193] *Cf. id.* at 1220 (majority opinion) (granting the petition for a writ of certiorari, vacating the judgment, and remanding to the Second Circuit with instructions to dismiss the case as moot).

[194] *Id.* at 1221 (Thomas, J., concurring).

there are limited powers of the government to censor and to limit speakers.[195] The Court dismissed the certiorari petition as moot because of course we have a different person in the White House now.[196]

But Justice Thomas took this opportunity to—and I should say, not because my article was cited, because it was a truly scholarly discussion. I learned a lot. There were references to cases that I haven't even heard of. But Justice Thomas took this opportunity to rehash some of the issues that were brought up here, which is: What are the roles of private entities when they assume essentially a public role in democratic discourse?[197]

Hon. Barbara Lagoa: Eugene, you mentioned, and so did Randy, that neither of you have reached a final opinion as to whether social media companies should be regulated as public accommodations. Personally, as the child of people who fled Cuba, regulation by the government makes me a little nervous. So, if there were to be regulations of digital platforms, how do you envision the enforcement regime working?

Prof. Eugene Volokh: Sure. It's a very good question. I don't really fully know the answer. I do want to suggest there are two separate questions here. Just to remind people, I mean, it's obvious there are, but it's worth remembering. One is: What First Amendment constraints are there on this? So, for example, the First Amendment allows people—allows states and Congress to impose rights of access to other's property even in the absence of any monopoly or quasi-monopoly.[198] *Turner Broadcasting* involved something that did talk a

---

[195] *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated . . . but it must not, in the guise of regulation, be abridged or denied."); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111–12 (2001) ("[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."); Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 679 (2010) (permitting "restrictions on access to a limited public forum" subject to the requirement that "[a]ny access barrier must be reasonable and viewpoint neutral").

[196] *Cf. Biden*, 141 S. Ct. at 1220–21 (granting the petition for a writ of certiorari, vacating the judgment, and remanding to the Second Circuit with instructions to dismiss the case as moot).

[197] *Id.* at 1221–22 (Thomas, J., concurring).

[198] *See, e.g.,* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85–88 (1980) (holding that a state law preventing private property owners from evicting political protesters did not violate the First Amendment); Rumsfeld v. F. for Acad. & Institutional Rts., 547 U.S. 47, 69–70 (2006) (holding that a federal law requiring universities to provide access for military recruiters did not violate the First Amendment).

little bit about monopoly.[199] But *PruneYard*—you know, shopping centers, there are lots of shopping centers out there. *Rumsfeld v. FAIR* involved access to universities which are not monopolies.[200]

As a First Amendment matter, it may be perfectly permissible to impose restrictions even on entities that don't have a lot of market power compared to the market as a whole.[201] On the other hand, as a policy matter, I think the more we can leave to competition, the better.[202] So one possibility that people have been talking about that's an interesting possibility, though in some respects much more radical in the change that it would create to the structure of these things, is a requirement of interoperability.[203]

With phone companies, they're partly non-monopolies because I can call anybody using my phone company regardless of what phone company they're on. If phone companies only provided access within their network, then it would be pretty likely, because of network effects, that one company would end up dominating everything because nobody would want to join the competitor because they wouldn't be able to call their friends on the competitor.

So, you can imagine a regime where Facebook and Twitter, for example, had to provide interoperability, which is to say that if MeWe, a competitor to Facebook, or Parler, competitor to Twitter, comes up, then they could deliver things to people who are on other networks and can receive things from people who are on other networks. And that would make it easier for upstarts to be created, and somebody could move to an upstart without losing access to all of their friends on the other platform.

You could imagine that as a content-neutral rule that might better harness the power of our marketplace rather than purely the power of

---

[199] Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 185, 197 (1997) (holding that the Cable Act's "must-carry" provision, which protected broadcast stations from local cable TV monopolies, did not violate the First Amendment).

[200] 547 U.S. at 51–52; *see* Volokh, *supra* note 18, at 437 ("PruneYard and Rumsfeld show that the government can also impose these sorts of hosting mandates even when the property owner lacks anything close to monopoly power.").

[201] Volokh, *supra* note 18 at 437.

[202] *Id.* at 412–13 (describing five possible wrinkles in the case for treating online platforms like common carriers: (1) it may encroach on private property rights; (2) issues might not be serious enough to justify significant government interference; (3) valuable norms might be better enforced by private property owners and the free market than the government; (4) government regulation could make problems worse if the cost of compliance diminishes competition; and (5) costly litigation could chill the legitimate removal of material).

[203] *Id.* at 413–14; *see also* Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 329–30 (2021) (arguing that interoperability would promote competition through mandated data sharing but would also lead to less data privacy).

regulation.[204] This having been said, I'm sure there are lots of both technical issues and economic issues having to do with that.[205] And certainly Facebook and Twitter might say, we invested billions of dollars in creating our networks in a way that was not open to third parties, and we are entitled to preserve that investment without this kind of very massive structural regulation.

But that's one possible alternative that some people have been talking about. Try to make sure that there are going to be many more competitors.[206] And the way to do that has to be through some interoperability requirement.[207]

Hon. Barbara Lagoa: Randy, do you have a response?

Prof. Randy E. Barnett: Here's one way to think about it. Eugene works for UCLA, a government-run, state-owned school. I work for Georgetown, a private university. This means that Eugene has certain First Amendment protections at UCLA.[208] At Georgetown, I don't have First Amendment protections because it's a private university.[209] The idea that Georgetown would be subjected to the same kind of free speech protections that UCLA is doesn't strike me as that radical a proposal.

I am not proposing this, by the way. But I don't think it would be a radical result. I don't think it's necessary or proper to do that with universities, frankly, because they're not common carriers. They're not public fora. They don't fit the criteria. I'm just using it as an analogy.

---

[204] Lemley, *supra* note 203, at 333 ("[I]nteroperability . . . open[s] markets to new competitors rather than conduct-related regulation that entrenches incumbents and makes it harder for newcomers to compete.").

[205] *Id.* at 333–34 (exploring the hard choices that an interoperability rule could require, such as "favoring antitrust enforcement that demands structural separation," "favoring interoperability at the expense of privacy," "opposing geoblocking and the effort to splinter the Internet along national lines," and "preserving laws that give tech companies the freedom to decide what content to allow on their site").

[206] *See id.* at 332; Kelly Ranttila, *Social Media and Monopoly*, 46 OHIO N.U.L. REV. 161, 166, 174 (2020) (suggesting that antitrust laws could be appropriately applied to social media platforms, thus creating more competition and curbing the influence these platforms have on the content available to the general public).

[207] *See* Lemley, *supra* note 203, at 335 (summarizing the merits of the interoperability rule for internet platforms: more free services, less restrictions, more choices for consumers, less restrictive than government regulation).

[208] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 299–300 (1989) (explaining the incongruous effect of the state action doctrine which prohibits public universities from infringing on students' and staffs' constitutional liberties but insulates private universities from the scope of judicial intervention).

[209] *Id.*

Our conditions of employment are not that different. Georgetown actually does honor free speech. We have a free speech policy.[210] It's voluntary in the sense that it's not mandated by the government.[211] But what I'm expressing openness to is the suggestion that a private entity—like Facebook and Twitter—would be subject to constraints provided by the First Amendment that UCLA is already subject to. So, it doesn't seem like it's that onerous.

And at the same time, as Eugene has pointed out and as I tried to also point out, UCLA is free to regulate unprotected speech and to exclude unprotected speech.[212] That would not violate the First Amendment.[213] UCLA cannot be made to speak by the government and say something that they don't believe in.[214] And I think the same kind of constraints should be imposed on regulations of these social media platforms if we're open to them.

Hon. Barbara Lagoa: Jane, go ahead.

Prof. Jane Bambauer: Even if we take that analogy, it's not clear whether Facebook is like a room within the university where there might be some programming that the university should be able to control what other speakers say or whether it's more like the open

---

210 GEO. UNIV., FACULTY HANDBOOK § IV(L) (2017), https://facultyhandbook.georgetown.edu/section4/l/.

211 *See* NCAA v. Tarkanian, 488 U.S. 179, 191 (1988) ("As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'") (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)); Brian J. Steffen, *Freedom of the Private-University Student Press: A Constitutional Proposal*, 36 J. MARSHALL L. REV. 139, 139–40 (2002) ("Among those private organizations that need not observe First Amendment rights of free expression are private institutions of higher education . . . .").

212 *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10438, FREE SPEECH ON COLLEGES CAMPUSES: CONSIDERATIONS FOR CONGRESS 2 (2020) (discussing the extent to which the government can regulate speech, specifically highlighting the government's authority to regulate categories of unprotected speech, such as obscenity, fighting words, or defamation, but noting that that authority does not extend to protected speech, even hate speech, unless the restriction satisfies strict scrutiny).

213 *See, e.g.*, NOVAK, *supra* note 212 (highlighting categories and types of unprotected speech including obscenity, incitement, fighting words, defamation, threats, and child pornography); Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1023 (N.D. Cal. 2007) ("With [the university's regulation's] reach limited to intimidation or harassment that threatens or endangers health or safety, we are inclined to believe that the vast majority of the conduct that this provision would prohibit would not fall within the sphere that the First Amendment prohibits the government from suppressing.").

214 *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (acknowledging that a university may make decisions regarding the content of its speech when it is the speaker).

mall on the campus where almost anything goes. And I think even that analogy leaves some open issues.

The other concern is that online behavior really is different from in-person behavior, and I think we should just put that on the table here—that when there's a loud and obnoxious ranter on the public lawn of a university—I know this from personal experience because it was my grandfather. He was the guy that was like the looney yelling at people, and all of the other family members were ashamed. But you could watch people politely route around him. On the internet, you know, toxic trolling speech is much more common, and there's less social signaling and embarrassment, and less reason not to do it.[215]

The other thing I want to say about this analogy to public places of accommodation is that two things are going on. The public accommodations law prevents businesses from controlling access based on the status of the person who wants something.[216] And there, I would be comfortable with a law that says that Facebook could not deny someone access to a Facebook profile because they subscribe to some ideology. What's going on here, though, is that the speech and behavior that is actually taking place on these fora are the reason that the platforms are or are not taking action.[217]

And so this is quite different. Even public accommodations can kick people out for being obnoxious and rude or for disturbing their other patrons.[218] And even the shopping center in *PruneYard*; the entire case was premised on the idea, first of all, that it was a handful of orderly persons soliciting signatures.[219] That word "orderly" is important, I think. Further, *PruneYard* actually had no direct First Amendment interest. They actually did not object to the content of the

---

[215] *See* Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017), https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/ ("People are snarky and awful online in large part because they can be anonymous.").

[216] *See*, *e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12182(a) (prohibiting discrimination by public accommodations on the basis of a disability); Civil Rights Act of 1964, 42 U.S.C § 2000(a) (prohibiting discrimination by public accommodations on the basis of race, color, religion, or national origin).

[217] *See, e.g.*, Emily Birnbaum, *Facebook Bans Milo Yiannopoulos, Alex Jones, Other Dangerous Figures*, THE HILL (May 2, 2019, 2:40 PM), https://thehill.com/policy/technology/441854-facebook-bans-dangerous-figures-including-milo-yiannopoulos-and-alex-jones/ (reporting that Facebook banned multiple accounts linked to prominent figures in light of Facebook's policy of barring those who promote hate or violence on the platform).

[218] Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 412 (2021); Crouch v. Ringer, 110 Wash. 612, 618 (1920) ("The law is well settled that the proprietor of a place of business to which the public is invited generally, may request one making a disturbance to leave, and, upon noncompliance, may use such force as is necessary to eject the disturber.").

[219] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980).

leafleteers. They objected as property owners rather than as a speech forum.[220] And that really limits how widely we should be interpreting that case to prevent a company that's trying to actually manage the speech that's being done on their platform.

Prof. Eugene Volokh: Can I just briefly respond? So, I think there's a lot to be said about all this and in support of what Jane is saying, but I want to suggest one important distinction here. And I mentioned this when I was talking about the hosting function versus the comment management function. If I have a Facebook page, which I do but I never monitor—but imagine that I had a Facebook page where I actually had people commenting, it would be really bad for our conversations if people could freely go up there, post vulgarities, post spam, post various other things. I could certainly imagine myself shutting down the Facebook page if people were intruding in those conversations this way. I think there's a lot of value and possibly First Amendment protected value in this kind of moderation of comments on other people's pages.

On the other hand, it means nothing to me that some Nazi who thinks that people like me should have been exterminated happens to have a Facebook page. I'm upset that he's out there in some sense, but it's not something that interferes with my enjoyment of Facebook simply knowing that the Nazi's out there. And if it did, then I don't think that that's the kind of reasonable concern that needs to be accommodated.

To give an example: Twitter allows pornography.[221] There are porn Twitter feeds out there. I don't think I've ever accidentally stumbled across one or had—

Prof. Randy E. Barnett: —This is new information. I've 36,000 followers, but now I've learned something about Twitter.

Prof. Eugene Volokh: Well, there you go. So again, that kind of mere presence of something on the network doesn't really make it unusable except in the sense that some people may militantly say, I refuse to do it, have anything to do with any property that has anything like that on it. And again, we don't view that as a reason to allow phone companies to block lines.[222] That's why I think it's important for us to

---

[220] *Id.* at 85–87; *id.* at 95–96 (White, J., concurring).

[221] *See Sensitive Media Policy*, TWITTER (Jan. 2022), https://help.twitter.com/en/rules-and-policies/media-policy (allowing users to share adult content so long as the user marks the tweet as sensitive).

[222] *See*, *e.g.*, Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 129–31 (1989) (striking

distinguish attempts to moderate that are aimed at just removing things all together, even when they're seen by willing viewers versus blocking things—and especially spam which needs to be blocked for things to be viable—that appear on the pages of people who didn't volunteer for that.

Hon. Barbara Lagoa: Well, this is going with that idea, and this goes to Randy and Jane. And then everyone else can join in. Randy—in defining social media companies, you talked about that these forums should be limited to barring speech that the Supreme Court has found to be unprotected from government restriction. And I'd like to focus on one of them in particular which is the fraud category.

Fraud is unprotected speech,[223] but would social media companies be able to ban misinformation? Because my idea of misinformation may be your idea of information, and who gets to decide what is misinformation and what is information? Because we're living in a society where it's Orwellian, and I'm not sure I can call myself a woman anymore.

Prof. Randy E. Barnett: Don't distract me, Judge. [Laughter] As my Con Law II students will affirm, I make a very big point of the fact that fraud is not the same thing as dishonesty or falsity.[224] Fraud is a tort. Fraud has elements, and you have to make out those elements in order to make a case of fraud.[225] You can't go into court and sue somebody for saying something that's false. The fraudulent speech that is unprotected is an actual tort.[226]

---

down a ban on sexually explicit commercial telephone messages because, although considered "indecent," they did not constitute obscene content).

[223] *See* United States v. Alvarez, 567 U.S. 709, 723 (2012) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.").

[224] *Id.* at 718 ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.").

[225] 37 AM. JUR. 2D *Fraud and Deceit* § 27 (2022), Westlaw (database updated Feb. 2022) (explaining that a plaintiff must prove six things to prevail on a "fraudulent misrepresentation" claim: (1) "the defendant made a false representation of a material fact with knowledge of its falsity," (2) "the representation related to a past or present fact," (3) "the defendant intended the representation to induce the plaintiff to act or be justified in acting upon it," (4) "the plaintiff acted in reliance upon the representation to his or her detriment," (5) "the plaintiff's reliance was reasonable under the circumstances," and (6) "the false statement proximately caused the plaintiff's injury").

[226] *See supra* notes 223–25 and accompanying text.

Same thing with commercial speech.[227] Commercial speech is regulated by its own test, the *Central Hudson* test, in that commercial speech must not be misleading.[228] But remember, that's misleading with respect to commercial transactions, with respect to a commercial product. And so I could imagine that also could be something that Facebook or Twitter could ban that would not be protected commercial speech. But I think it's very important when you make exceptions to a presumption of liberty, to coin a phrase, that these exceptions must be identifiable, definable, and very limited.

Otherwise, the exceptions will swallow the rule. That is the danger of making any exceptions. On the other hand, we have always made exceptions as we must. The exception to freedom of contract is fraud, duress, unconscionability, incapacity.[229] They just have to be limited.

Hon. Barbara Lagoa: Jane, do you want to respond?

Prof. Jane Bambauer: I agree with the description that fraud is quite narrow, that there are intent elements.[230] There are harm elements, which a lot of the misinformation—you know, debates about misinformation ignore whether there's actually evidence of harm. That said, though, I'm more reluctant than Randy, again, to want to prevent a private company from experimenting with intervening with misinformation or potential misinformation that might have harmful effects.

Now, one reason I say this is that my thinking about what has happened in the wake of social media has evolved over time. And I'm convinced that when people are engaged on social media, their interest in pursuing accuracy is sometimes in tension or direct conflict with their interest in a sense of belonging and with socializing and with the principle reason many people go onto social media in the first place. And so I am concerned about conspiracy theories, about false claims of various sorts that do not constitute fraud but that nevertheless cause

---

[227] Va. State Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

[228] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (establishing a four-part test for the constitutionality of restrictions on commercial speech under the First Amendment which considers: (1) whether the speech concerns unlawful activity or is misleading, (2) whether the governmental interest is substantial, (3) whether the challenged restriction advances an asserted government interest, and (4) whether the restriction is more extensive than necessary to serve that interest).

[229] 17A AM. JUR. 2D *Contracts* §§ 27, 209, 212, 271, Westlaw (last updated Feb. 2022).

[230] *See supra* note 225 and accompanying text.

harm, either internalities or externalities to other people.[231] At the same time, right now—we're not in the equilibrium yet.

Right now, Facebook and Twitter are over-moderating. I think I'd agree with that. They are making mistakes. They're taking a authoritative position where they should not—where we should have much more humility. And a good example is the lab theory of COVID, which was treated as misinformation and was removed everywhere on social media and now it seems like it's much more credible.[232] But still, I'm glad that we're in this very early phase of—

Hon. Barbara Lagoa: Can I interrupt you for a second—

Prof. Jane Bambauer: Yeah.

Hon. Barbara Lagoa: —because I'd like to address that point which is a lot of people—I'm not sure people in this room—but a lot of people, particularly young people, teens, millennials, literally get their information and their news from this [holds up her phone] and mainly from Twitter.[233] So when Twitter takes down any and all information on anything, even a news source, that you then have to track down in order to see what someone actually said, that is really very problematic for a country that's a democratic country that believes in free speech and has a constitutional right to freedom of speech. How do we address

---

[231] *See* Katherine Ognyanova et al., *Misinformation in Action: Fake News Exposure Is Linked to Lower Trust in Media, Higher Trust in Government when Your Side Is in Power*, 1 HARV. KENNEDY SCH. MISINFORMATION REV., June 2, 2020, at 1, 2. (analyzing "the potential of misinformation exposure to erode public confidence in key social institutions"); Peter Suciu, *Social Media Remains a Source for News and a Breeding Ground for Pandemic Conspiracies*, FORBES (Sept 3, 2021, 2:18 PM), https://www.forbes.com/sites/petersuciu/2021/09/03/social-media-remains-a-source-for-news-and-a-breeding-ground-for-pandemic-conspiracies/?sh=157938a3cb22 (highlighting the harm of sacrificing accurate information on social media platforms for information that is appeasing to the user's biases).

[232] *See* Carolyn Kormann, *The Mysterious Case of the Covid-19 Lab-Leak Theory*, NEW YORKER (Oct. 12, 2021), https://www.newyorker.com/science/elements/the-mysterious-case-of-the-covid-19-lab-leak-theory (explaining that proponents of the Lab-Leak Theory were initially dismissed as pariahs, but as circumstantial evidence continued to surface, the Theory gained more mainstream support).

[233] *See* Elisa Shearer, *More Than Eight-in-Ten Americans Get News from Digital Devices*, PEW RSCH. CENT. (Jan. 12, 2021), https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/ (reporting that 71% of adults aged 18 to 29 often access news from a digital device); Amy Mitchell et al., *Majority of Twitter Users Get News on the Site, and Most See It as an Important Way to Get News*, PEW RSCH. CENT. (Nov. 15, 2021), https://www.pewresearch.org/journalism/2021/11/15/majority-of-twitter-users-get-news-on-the-site-and-most-see-it-as-an-important-way-to-get-news/ (reporting that nearly seven out of ten Twitter users access news on the platform).

that because that is a problem? It's not just misinformation, but literally taking down information and access to information.

Prof. Jane Bambauer: Yeah. That's the error on one side. On the other side, leaving things up given that teenagers get all their news from Twitter, that may have its own perverse effects. My preferred solution here, ironically, is to expand opportunity to go after speakers—basically take the model of fraud and create some negligence information category so that speech that can be proven to have caused harm where the speaker knew or should have known that it was both wrong and likely to cause harm could be held liable.[234] And that way there's much less pressure on the platforms to try to have to manage these things.

Hon. Barbara Lagoa: Okay. I think we should start taking questions from the audience.

Allison Hayward: Good morning. My name's Allison Hayward. I am the case screening manager at the Facebook Oversight Board. A lot of people are talking about content moderation here this morning. I actually do it. And I just want to say first of all this has been an excellent panel. There's not a lot of mature, grown-up analysis being done in this space in my opinion right now. And this is just emblematic of how we should be talking about these questions and questions that I live with every day.

My question, though, is this. We've been talking about American users on an American platform. I think U.S. users make up maybe twelve percent of the users on Facebook.[235] The vast majority of our appeals, however, come from the U.S.[236] But that's another issue. I think that's because Americans are confident and litigious, but anyway. So, you've got a situation where you can't really bound Facebook geographically. Facebook can bound itself in a negative way by geocaching particular regions if they're being told they have to.

But as regulators, how do you deal with the fact that we're talking about these wonderful First Amendment values that don't apply

[234] Mark Verstraete et al., *Identifying and Countering Fake News*, 73 HASTINGS L.J. (forthcoming 2022) (manuscript at 25) (on file with editors) (advocating amending Section 230(f)(3) to assign liability to the party most responsible for false speech).

[235] Tom Fish, *These Countries Have the Most People on Facebook*, NEWSWEEK (Sept 2, 2021, 7:00 PM), https://www.newsweek.com/counties-most-people-facebook-1624911 (reporting that of the 1.84 billion daily active users on Facebook, 210 million are from the United States, or approximately 11.4% of Facebook's users).

[236] *See Oversight Board*, FACEBOOK (Jan. 28, 2022, 8:40 AM), https://www.facebook.com/OversightBoard/posts/473795800960670 (posting that the Oversight Board received more than 860,000 appeals since its founding).

legally to most of the people using Facebook? I think there's something missing in this conversation, and I would really like to hear some proposal for how you would propose to manage this. Would you say that there's one standard for users in the U.S. and one standard for the rest of the world?

Would you say that the rest of the world gets these wonderful First Amendment benefits that Americans have, which I treasure? Or is there some other way of coping with the fact that what we're talking about is an international body of people that really cannot be geographically bound? Thank you.

Prof. Eugene Volokh: I've thought a little bit about this, and I'm a big believer in geolocation and geofencing in the following sense: When a company does business in many countries, it needs to abide by the laws of those countries. Some of those laws may be ones I don't like, and those countries may dislike some of the laws that we have here in the U.S. But it's not a serious imposition, it seems to me, in a company like Facebook or company like Twitter to say that if you're operating in multiple countries you have to have different rules for different countries. Fortunately, these days, there is good technology that with to a high degree of accuracy determines which country someone's coming from.[237]

And yes, there could be then a solution saying, look, cartoons of Muhammad may be illegal in Saudi Arabia or in some other country. I don't know if they are, but let's say they are. Understandable that's the way things are there, and criticism of the Thai king is illegal in Thailand.[238] I think that's very bad, but they're a sovereign country. And therefore, if Facebook wants to operate in those countries, there should be blocking like that there.

But we should insist in America that they not enforce these rules here because the danger otherwise is that the most restrictive regimes, could be China—not all the companies operate there, but to the extent that some do—China says, you have to block criticism of Xi Jinping throughout the whole country—or throughout the whole world, excuse me.[239] So I think it's perfectly sensible to have different rules.

---

[237] *See, e.g.,* Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 594–98 (2012) ("[E]ntities that sell geolocation tools claim that their tools are highly effective. . . .").

[238] *See, e.g.*, Hannah Beech, *Woman Is Sentenced to 43 Years for Criticizing Thai Monarchy*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/world/asia/thailand-king-lese-majeste.html ("The onetime civil servant's crime was to share audio clips on social media that were deemed critical of Thailand's monarchy.").

[239] *See*, *e.g.*, Jonah Goldberg, *Column: At Least We Can Mock Trump. Chinese*

And just as I think Americans are entitled to speak subject to American law on Facebook, I wouldn't begrudge the French to insist that the Frenchmen be allowed to speak subject to French law on Facebook. And to the extent that that is somewhat burdensome on a company—and I can see why it would be—that's just a burden that comes from operating in multiple countries.

Prof. Randy E. Barnett: I have something really quick to add, and that is that if a privilege or immunity of citizens of the United States has been violated, that person is entitled to a remedy, either in state court by state law—or if states don't do it, then the federal government can do it.[240] So, if somebody is barred from Twitter or Facebook who's an American citizen, they would exercise this cause of action that they would have either by statute or some other means. And Facebook or Twitter would have violated their rights as an American.

I don't think that this would give Congress the power under its Section 5 powers to have an extraterritorial law which would protect the rights of citizens of other countries. This would be a protection that would be afforded to Americans under the Constitution and asserted by them as individuals when their individual right has been violated.[241]

Hon. Barbara Lagoa: Okay. Next question.

Anthony Bruno: Hi, my name's Anthony Bruno. Questions for the regulations-curious panelists: It seems like there are two different things going on here. And I just want to drill down on it. It seems like you may all be open to the idea of some affirmative legislation passed by Congress to restrict or provide protection for the users on these platforms. That might give some protection, but I also think that's quite unrealistic that we would actually see some legislation coming out of Congress. Maybe you'd get something at the state level.

Citizens Don't Have the Luxury of Criticizing Their Leader, L.A. TIMES (June 2, 2020, 3:00 AM), https://www.latimes.com/opinion/story/2020-06-02/united-states-china-trump-freedom-to-criticize (discussing the ban on images of Winnie the Pooh in China after the cartoon character was used as a symbol for President Xi Jinping).

[240] *See* Thomas H. Burrell, *Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 WHITTIER L. REV. 199, 245–47, 250–51 (2014) ("Privileges and immunities language is legislative in nature. There are both state laws or privileges and immunities and national laws or privileges and immunities.").

[241] *See generally* Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 602, 606 (2019) (analyzing the varying degrees of constitutional protections afforded to American citizens and foreign nationals in the United States and abroad).

But I think there's a second question. I think Professor Barnett's touching on it a little bit more in the context of the individual right of the user. Is the panel open to the idea that the user, absent some statute giving them some protection, can actually go into court to vindicate their First Amendment rights as it would be if it was government-controlled and they were de-platformed? Do we need a statutory protection here, or are we saying there's a constitutional right that an individual could go into court to vindicate?

Prof. Jane Bambauer: Right now, doing nothing, if no other statute is introduced, I think using a public accommodations law to make that claim is bound to fail, especially because we do have a federal statute, Section 230, that protects a platform's interest in doing its own content moderation.[242] And so I think something at the state level at least—

Hon. Barbara Lagoa: Jane, can we talk a little bit about 230 because we haven't really talked about that?

Prof. Jane Bambauer: Yeah.

Hon. Barbara Lagoa: Because 230—when that came into being, it was at the beginning or the advent of this technology, and it was *AOL* and *CompuServe* which obviously was a long time ago.[243] And they don't exist anymore.[244] The question is, the government gave these companies that immunity without anything in return.

Prof. Jane Bambauer: Well, I wouldn't quite put it that way, but the concern was that if platforms did anything active to remove bad content, maybe illegal, maybe not illegal content, then that active engagement with the content would make it susceptible to liability as

---

[242] 47 U.S.C. § 230(c).

[243] *See* Zeran v. AOL, Inc., 129 F.3d 327, 328 (4th Cir. 1997) (holding that CDA 230 immunized AOL from liability for content originating from third parties); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991) (declining to hold CompuServe liable as a publisher on First Amendment grounds); Jeff Kosseff, *The Lawsuit Against America Online That Set Up Today's Internet Battles*, SLATE (July 14, 2020, 5:45 AM), https://slate.com/technology/2020/07/section-230-america-online-ken-zeran.html (highlighting litigation involving CompuServe that triggered Section 230's enactment and its application in litigation involving AOL).

[244] Alison Weissbrot, *You've Got Mail: Say Goodbye to the AOL Brand*, CAMPAIGN US (May 4, 2021), https://www.campaignlive.com/about-us; Harry McCracken, *CompuServe's Forums, Which Still Exist, Are Finally Shutting Down*, FAST CO. (Nov. 14, 2017), https://www.fastcompany.com/40495831/compuserves-forums-which-still-exist-are-finally-shutting-down.

a publisher for any content that was left up that was also illegal—defamatory, say.[245]

You can see how something like Facebook wouldn't exist if any person who's ever been defamed could sue Facebook for failing to remove the post, right? So, Section 230 was designed to encourage companies like Facebook or the early progenitors from going ahead and actively removing bad or illegal content without having to worry about becoming effectively a publisher.[246] Now today, I think there's a big discussion about whether that's the right policy now that the World Wide Web is well established and these platforms are clearly doing fine in terms of their revenue.[247]

Hon. Barbara Lagoa: And I can't remember now, but I think Adam wrote about this or maybe it was Randy. But the dichotomy where the *New York Times* will have to pull a letter if it was in print—that's defamatory.[248] But if the same letter is put on the *New York Times'* Twitter account, it does not, which is strange.

Prof. Adam Candeub: It's very strange, and I also think it goes to our content-moderation discussion because the platforms incongruously claim that they have protection under Section 230(c)(1), which involved third-party speech when they're moderating content.[249] They claim that they have complete immunity to violate antidiscrimination laws and fraud laws when they're moderating content because it's *third-party* speech.[250] At the same time, on the

---

[245] *Zeran*, 129 F.3d at 330; Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 142–43 (2019).

[246] Edelman & Stemler, *supra* note 245, at 159.

[247] *See* Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/ (highlighting the dramatic and unforeseeable growth of the internet since Section 230's enactment in the 1990s); Megan Graham, *Digital Ad Spend Grew 12% in 2020 Despite Hit from Pandemic*, CNBC (Apr. 7, 2021, 11:00 AM), https://www.cnbc.com/2021/04/07/digital-ad-spend-grew-12percent-in-2020-despite-hit-from-pandemic.html ("Social media ad revenues reached $41.5 billion in 2020 . . . .").

[248] Adam Candeub, *Renegotiated NAFTA Will Entrench Big Tech Censorship*, REAL CLEAR POL. (Nov. 23, 2018), https://www.realclearpolitics.com/articles/2018/11/23/renegotiated_nafta_will_entrench_big_tech_censorship_138731.html.

[249] 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[250] *See* Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES, https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html (Dec. 15, 2020) (stating that Section 230 can be described as providing a "shield" that protects a platform from the content posted on it).

other side of their mouth, they'll say, "well, we have a First Amendment right to content moderate because it's *our* speech."[251] I think that's an inconsistency that the courts have allowed the platforms to continue with and I think something that will have to be examined more closely.[252]

Hon. Barbara Lagoa: Thank you.

Prof. Eugene Volokh: If I could just quickly respond to a somewhat different facet of the question. As I understood, the question is under existing law—without any new statutes—can there be a claim brought that an exclusion decision by Facebook or Twitter or Google is illegal or unconstitutional? And I think the answer is no. I don't read Section 230(c)(2) as broadly as Jane does. I used to, and then Adam persuaded me otherwise.

Prof. Adam Candeub: That was the biggest success of my academic career. [Laughter]

Prof. Eugene Volokh: But there's got to be a cause of action. Before we get to the question of whether it's preempted by 230, there's got to be a cause of action. Generally speaking, state public accommodation law does not apply to platforms,[253] and I think correctly. And the First Amendment doesn't apply to platforms because they are private actors.[254] There could be good reason for Congress to

[251] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1611–13 (2018) (discussing how it is difficult to decide whether online platforms, which do not function as speakers under the First Amendment, have content moderation rights due to their functionality as forums); *see, e.g.*, Google's Motion to Dismiss Plaintiff's Second Amended Complaint and Supporting Memorandum of Law at 7–13, e-ventures Worldwide, LLC v. Google Inc., 188 F. Supp. 3d 1265 (M.D. Fla. 2016) (No. 2:14-cv-00646) (claiming that Google is allowed to restrict material under both Section 230 and the First Amendment).

[252] *See* Klonick, *supra* note 251, at 1604–09 (describing the legislative history of § 230); *id.* at 1608 ("[Section] 230 can be characterized as both government-created immunity to (1) *encourage* platforms to remove certain kinds of content, and (2) *avoid* the haphazard removal of certain content and the perils of collateral censorship to users . . . .").

[253] *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 503–05 (2021) (describing why public accommodations laws are unlikely to be applied to social media platforms).

[254] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum."); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 392 (D.C. Cir. 2017) ("Facebook,

try to treat them as public and publicly regulated, but under existing law they are private actors[255] and, I think, quite correctly treated that way. There are a few possible asterisks in a few possible situations.[256] But generally speaking, it would require legislation whether federal or state for any of these restrictions to operate—as it should be, I think.

Hon. Barbara Lagoa: Let's go to the next question in the front.

Tyler Herman: Good morning. My name is Tyler Herman. I want to highlight a specific type of content moderation and see if it impacts your analysis at all or specifically the answer to the previous question, in fact. Over the last two years, a big focus of the mis- and disinformation has been election-related mis- and disinformation, and at the federal level,[257] I believe—and certainly secretaries of state have created programs where they are monitoring posts to social media. And they, the government entities, are going to Facebook or Twitter and saying, "You should take a look at this post; this post is false; this post is problematic." And then it's the social media company that's removing it, but they're doing it at the direction of or after being highlighted by a government entity.[258]

Google, Twitter, and YouTube . . . . are not considered common carriers that hold themselves out as affording neutral, indiscriminate access to their platform without any editorial filtering.").

[255] *See* Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 36, 49–50 (2019) ("As private entities, social media platforms fit well within the Court's description of a private actor that simply opens up its property for speech."); *see, e.g.*, Prager U. v. Google, 951 F.3d 991, 995 (9th Cir. 2020) ("Despite YouTube's ubiquity and its role as a public-facing platform, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment.").

[256] *See, e.g.*, Eric Sirota, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 793–94 (2018) (discussing how the "degree of entanglement" between an actor and the state, defined in part by the level of regulation, funding, and encouragement the state has on the action, determines whether an actor is considered private).

[257] The issue is prominent enough to warrant an official government website dedicated to the correction of mis- and disinformation regarding elections. *Election Security Rumor vs. Reality*, CISA, https://www.cisa.gov/rumorcontrol (Nov. 2, 2021).

[258] *See* JOHN SAMPLES, CATO INSTITUTE, POLICY ANALYSIS NO. 865, WHY THE GOVERNMENT SHOULD NOT REGULATE CONTENT MODERATION OF SOCIAL MEDIA 1 (2019), https://www.cato.org/policy-analysis/why-government-should-not-regulate-content-moderation-social-media ("Speech on social media directly tied to violence—for example, terrorism—may be regulated by [the] government . . . ."); *id.* at 2–5, 22–23 (reinforcing that only the social media platforms have the ability to remove user-generated speech); *see, e.g.*, Sheryl Gay Stolberg & Davey Alba, *Surgeon General Assails Tech Companies over Misinformation on Covid-19*, N.Y. TIMES, https://www.nytimes.com/2021/07215/us/politics/surgeon-general-vaccine-misinformation.html?searchResultPosition=3 (Sept. 12, 2021) (describing the U.S.

Prof. Eugene Volokh: So that's the asterisk that I mentioned. There's an interesting question. What happens when private entities get messages from the government saying, "take stuff down"? I did some research recently, and here's the shape of the First Amendment law in the circuits on this: if the government says, "you better take it down or else," that's government coercion.[259] That's state action—state or federal. It doesn't matter. That is, in fact, a possible First Amendment violation. But the cases say—they're pre-internet cases, but they're very structurally analogous—if the government merely *urges* entities to take things down, writes a letter to some company, or some bookstore, saying, "You shouldn't carry this game that people find offensive for ideological reasons that we find offensive"—that's just government speech.[260] And that's just government encouragement that they're entitled to engage in.

Here's the curious thing. When it comes to the Fourth Amendment, the rule is somewhat different.[261] At least a lot of lower courts say, if the government calls up me as a landlord and says, "Look, we can't search your tenant's apartment because we don't have probable cause and a warrant, but we know you can; and we know you have the right under your contract to go and inspect it for various things; next time you're there, you want to check and see if there are

---

Surgeon General's request for social media companies to "operate with greater transparency and accountability" and to "monitor misinformation, more closely"); Zolan Kanno-Youngs & Cecilia Kang, *'They're Killing People': Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES, https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html (July 19, 2021) (noting social media platforms' struggle with balancing governmental requests for moderation with maintaining a platform for free speech).

[259] *See* Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning"*, LAWFARE (July 26, 2021, 3:52 PM), https://www.lawfareblog.com/informal-government-coercion-and-problem-jawboning ("The court concluded . . . that government efforts to intimidate private intermediaries into suppressing other private persons' speech by threatening them with bad consequences if they did not comply violated the First Amendment . . . .").

[260] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67–68, 71–72 (1963) (holding that discussion between a government and private entity without threat of legal sanction or other means of intimidation does not constitute coercion); Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) (describing governmental coercion as occurring when the State exerts such influence upon a private party as to make the State responsible for the party's conduct).

[261] *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (stating that the Fourth Amendment does not protect against unreasonable search and seizure by a non-government agent). *But see* Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 614–15 (1989) ("Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.").

any marijuana plants or something like that," then that is state action.[262] So government persuasion and encouragement and requests in the Fourth Amendment are state action, but, in the First Amendment, they are not. And I don't know what the right answer is.

Hon. Barbara Lagoa: But you're asking that person to become a state actor for you. That's why.

Prof. Eugene Volokh: Right. But if the government is calling me up and telling me to remove something from my site, just because—the classic example is a police department calls up a newspaper and says, "Look, we know you're about to run this story. We can't stop you, but it's going to interfere with a police investigation. Don't you want to catch criminals? Don't you want criminals to be caught? If you do, can you just accommodate us on this?" I think that happens not infrequently. CIA sometimes does this with regard to national security things.[263] And I think that's generally thought not to be enough to be state action.[264] Maybe it should be. I don't know.

Prof. Adam Candeub: Well, first, we'll talk about the cases maybe afterwards. I think that there is some case law suggesting that a coordination of parallel action, even in the First Amendment, can constitute state action.[265] But I want to get this back to common carriage and one of the benefits of a common carriage-type regime. As the questioner correctly pointed out, one of the big problems of having large, concentrated media entities is that they can collude and

---

[262] *See Burdeau*, 256 U.S. at 475 ("In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property . . . . It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another."); Chapman v. United States, 365 U.S. 610, 616–17 (1961) (holding that a landlord may not use pretext of an admissible entry to conduct a search of a tenant's premises).

[263] *See, e.g.*, *Editor's Note*, N.Y. TIMES (June 22, 2008), https://www.nytimes.com/2008/06/22/washington/web22smnote.html (stating that the CIA requested the Times not to print specific information).

[264] Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1388–89 (2006) ("[A] private party will be considered a 'state actor' in cases where the government was 'significantly involved' in the actions of the defendant, or, considering the matter from another perspective, where the actions of the defendant are 'fairly attributable' to the government.").

[265] *See id.* at 1388–89, 1389 nn.53–54 (referencing several Supreme Court cases holding when private actors are considered state actors due to their interactions with the government).

cooperate with government and take away our rights and do bad things to democracy.[266]

Common carriage has a nice effect because it allows the media companies to say, "Look, I'm sorry, Mr. Government; I cannot bias my reporting or my algorithms to make you happy; it's against the law."[267] And it places a nice barrier between the government and media and First Amendment actors. I think that's one of the reasons why we have a free press and we have not worried about things like constant telephone surveillance.

Hon. Barbara Lagoa: Let's go to the microphone in the back first.

Duane Horning: Good morning. My name is Duane Horning. I'm from San Diego, California, the home of *PruneYard*. And *PruneYard* is notable because it requires shopping centers to function essentially as the public square—literally the public square, and it requires the private owners of those shopping centers to accommodate public speakers as the government would in a public square.[268] *PruneYard* is limited to California. It was a California Supreme Court case. The U.S. Supreme Court case affirmed it but only for California.[269]

Now, I'm not a big fan of *PruneYard*, but it does seem to me that it's a very easy step to go from physical shopping centers governed by *PruneYard* to internet platforms, where shopping centers are

---

[266] *See, e.g.*, SAMPLES, *supra* note 258; Elizabeth Dwoskin et al., *The Case Against Mark Zuckerberg: Insiders Say Facebook's CEO Chose Growth over Safety*, WASH. POST, https://www.washingtonpost.com/technology/2021/10/25/mark-zuckerberg-facebook-whistleblower/ (Oct. 25, 2021, 3:34 PM) ("Late last year, Mark Zuckerberg faced a choice: Comply with demands from Vietnam's ruling Communist Party to censor anti-government dissidents or risk getting knocked offline in one of Facebook's most lucrative Asian markets . . . . Zuckerberg personally decided that Facebook would comply with Hanoi's demands."); *Russia: Social Media Pressured to Censor Posts*, HUM. RTS. WATCH (Feb. 5, 2021, 12:50 PM), https://www.hrw.org/news/2021/02/05/russia-social-media-pressured-censor-posts# ("Russian authorities are escalating pressure on social media companies, forcing them to censor online content deemed illegal by the government . . . . [T]ech giants are 'actively' cooperating."); Kanno-Youngs & Kang, *supra* note 258 ("Since January, senior White House officials, including the surgeon general, Dr. Vivek Murthy, have been in talks with [Facebook] to stop the spread of false stories about vaccination side effects and other harms.").

[267] *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) ("A common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing' . . . . A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" (alteration in original) (citations omitted)).

[268] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 78–79 (1980).

[269] *Id.* at 78–79, 88 (expressly affirming the holding of the Supreme Court of California).

physically the public square, and now the internet, essentially, and the companies we've been talking about are the electronic version of that public square. It seems to me that that would be almost an automatic extension. Now, it is limited to California, but it just so happens Facebook and Twitter and Alphabet and Amazon—all these companies are in California.[270] And California has 11 percent of the population.[271]

And if 12 percent of Facebook customers are in the U.S., I think probably the other 88 percent are in California. [Laughter] So if *PruneYard* was extended to apply to these companies only in California, the effect would be truly worldwide. Why wouldn't *PruneYard* be an easy place for someone who wanted to regulate the internet actors as the public square?

Prof. Adam Candeub: Just quickly, the sad reality is, from my perspective, that the state courts in California have been not very pro-*PruneYard*, and they have not expanded, as far as I know, the doctrine in a lot of different places.[272] But I'll leave it to Jane.

Prof. Randy E. Barnett: I see a difference between shopping centers which provide a public accommodation for shopping in which a nondiscrimination norm should be applicable under public accommodation law and is applicable under public accommodation laws—you cannot discriminate against people on the basis of race and religion and others from *shopping* at that shopping center.[273] I don't

---

[270] *See, e.g.*, *Our Offices*, META, https://about.facebook.com/company-info/ (last visited Jan. 21, 2022) (stating that Facebook's headquarters are located in Menlo Park, California); *Find Us Here*, TWITTER, https://careers.twitter.com/en/locations.html#Offices (last visited Jan. 21, 2022) (listing three of Twitter's offices in the state of California); ALPHABET, YEAR IN REVIEW 20 (2020) (noting that Alphabet's headquarters are in Mountain View, California); Amazon Staff, *Amazon's Impact in Southern California*, AMAZON (Feb. 8, 2018), https://www.aboutamazon.com/news/job-creation-and-investment/amazons-impact-in-southern-california (reporting how Amazon has opened multiple large-scale operations and ten fulfillment centers in California).

[271] *See* U.S. CENSUS BUREAU, APPORTIONMENT POPULATION AND NUMBER OF REPRESENTATIVES BY STATE: 2020 CENSUS 1 tbl.1 (2020), https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf (providing population information to calculate California's population at approximately 11% of the entire United States population).

[272] *See, e.g.*, Albertson's, Inc. v. Young, 107 Cal. App. 4th 106, 119, 121–22 (2003) (applying the reasoning in *PruneYard* to the case without expanding on the holding). *But see* Westside Sane/Freeze v. Hahn, 224 Cal. App. 3d 546, 552–56 (1990) (expanding the holding of *PruneYard* to include other free speech activities at shopping centers).

[273] 42 U.S.C. § 2000a ("All persons shall be entitled to the *full and equal enjoyment* of the goods, services, *facilities*, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of *race*, color, *religion*, or national origin." (emphasis added)).

see public shopping centers as creating an expressive forum—a forum for expression.

And therefore, I question whether a First Amendment-type protection is applicable to a nongovernment public space that is not about expression at all. What we're talking about today is the creation of expressive forums and whether, in such a forum, people can be excluded because of their speech. It is a nongovernment expressive public forum that would be bound by a First Amendment regime, but I do not think private shopping fit that description.

Duane Horning: Can I just follow up on that? Because actually under *PruneYard*, that's exactly what's required. It has nothing to do with excluding people because of their color not to shop there. It requires the shopping center owners to allow public expressive speech.[274]

Prof. Randy E. Barnett: I know. I'm dissenting from *PruneYard* is what I'm doing. And the fact that it's a California case makes it all the worse. [Laughter]

Prof. Jane Bambauer: The shopping center, though, in *PruneYard* never actually argued—this is why Randy's point about expressive forum isn't so important. They never argued they were an expressive forum. They argued that as a private property owner, merely because of their property interest, they should have a First Amendment right to exclude speakers[275] because it would become compelled hosting of that speech. And the case, I think, is quite limited to its facts.

First of all, like I said earlier, the majority emphasized that these were orderly persons, so they weren't getting in the way of the shopping mall's attractiveness to its other customers.[276] But more importantly, Powell's concurrence—if you read that, I think it has a lot of fodder for explaining why a social media platform could not be put in the same category as a shopping center. So first of all, Powell said that he's worried that if there's substantial annoyance to other customers for

[274] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) ("[T]he requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights . . . .").

[275] Brief for Appellants at 12, *PruneYard*, 447 U.S. 74 (No. 79-289) ("The constitutional rights of private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others.").

[276] *PruneYard*, 447 U.S. at 77 ("[Appellees'] activity was peaceful and orderly and so far as the record indicates was not objected to by PruneYard's patrons.").

having to pass through or even be associated with the disfavored speech, then it would require these really elaborate time, place, and manner restrictions.[277] And he thought that *PruneYard* should not impose—that even the California state constitution could not impose—that kind of Byzantine rule creation requirement on a private property owner.[278]

But he also said—and this I think is important—that the strong emotions that would be evoked by speech by others who are seeing it in a public place might cause a shopping center like *PruneYard* to have to respond.[279] And that, I think, is what's happening with Facebook and Twitter. Facebook really didn't want to be in the content moderation business.[280] But the reaction to what is posted there publicly and publicly viewable is so repugnant to people that Facebook, in order to keep credibility and the happiness of many of their users, had to respond.[281]

And then finally, Powell explained that in this case there was no evidence about the number and type of interest groups that are going to seek access to the center and that this shopping center, PruneYard, did not object to the ideas that were contained in the particular pamphleteers.[282] So all of those pretty narrowly conscribe *PruneYard*. Eugene, I'm wondering what you think.

---

[277] *Id.* at 96 (Powell, J., concurring) ("Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions.").

[278] *Id.* at 96–97 ("[S]tate power to regulate private property is limited to the adoption of reasonable restrictions . . . .").

[279] *Id.* at 99–100 ("A property owner also may be faced with speakers who wish to use his premises as a platform for views that he finds morally repugnant. . . . The strong emotions evoked by speech in such situations may virtually compel the proprietor to respond.").

[280] *See* Andrew Marantz, *Why Facebook Can't Fix Itself*, NEW YORKER (Oct. 12, 2020), https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself ("[Facebook] considers itself a neutral platform, not a publisher, and so has resisted censoring its users' speech, even when that speech is ugly or unpopular."); Cecilia Kang & Mike Isaac, *Defiant Zuckerberg Says Facebook Won't Police Political Speech*, N.Y. TIMES, https://www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html (Oct. 21, 2019) ("In a winding, 35-minute speech at Georgetown University's Gaston Hall . . . Mr. Zuckerberg fought back against the idea that the social network needed to be an arbiter of speech.").

[281] *See* Marantz, *supra* note 280 (stating that Facebook's choices to moderate content are often driven by negative press).

[282] *PruneYard*, 447 U.S. at 101 ("Appellants have not alleged that they object to the ideas contained in the appellees' petitions. . . . The record contains no evidence concerning the numbers or types of interest groups that may seek access to this shopping center, and no testimony showing that the appellants strongly disagree with any of them.").

Hon. Barbara Lagoa: Eugene, can we go to the next person? Because we have a lot of people still left. Let's go to the front microphone. Thank you.

Connor Mighell: Connor Mighell, Center for the American Future. This question actually goes to Section 230's text, which probably should matter if regulation is on the table. 230(c)(1) says platforms should not be treated as providers of third-party content that they host.[283] But (c)(2) is the liability shield for platforms, and it seems to require platforms to only censor or edit in good faith a limited list of objectionable content, not just everything they don't like, in order to fall under this shield.[284] And circuit courts have interpreted (c)(2) broadly to shield a great deal of decisions by platforms or have kind of ignored it altogether in favor of (c)(1).[285] What do you think SCOTUS will do when they reach (c)(2)? And how would you advise providers to read the entirety of Section 230 in the meantime?

Prof. Eugene Volokh: So 230(c)(2), to be fair, provides that platforms are immune for, in good faith, restricting content that is lewd, filthy, harassing, violent, or otherwise objectionable.[286] So it doesn't just have a list. It says, "or otherwise objectionable."[287] And one controversy among lower courts, which are somewhat split on this, is whether that means *anything* the platforms—and good faith simply means sincerely find objectionable—so for example, they find certain ideologies objectionable.[288]

---

[283] 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[284] § 230(c)(2)(A) ("No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.").

[285] *See* Zeran v. AOL, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (discussing Section 230(c)(1) and not Section 230(c)(2)); Batzel v. Smith, 333 F.3d 1018, 1029–30 (9th Cir. 2003) (focusing only on § 230(c)(1)); Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1173, 1176–78 (9th Cir. 2009) (interpreting Section 230(c)(2) broadly in determining that "a provider of software or enabling tools that filter, screen, allow, or disallow content" falls under the statute's protection).

[286] § 230(c)(2).

[287] *Id.*

[288] *See, e.g.*, Enigma Software Grp. USA v. Malwarebytes, Inc., 946 F.3d 1040, 1044–45 (9th Cir. 2019) ("We hold that the phrase 'otherwise objectionable' does not include software that the provider finds objectionable for anticompetitive reasons."); Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) ("The Court declines to broadly interpret 'otherwise objectionable' material to include any or all information or content."). *But see* E360Insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 608–09

Certainly, people find ideologies objectionable. They can just block it because that's otherwise objectionable. Or whether you follow the interpretive canon of *ejusdem generis* which says that terms such as "otherwise objectionable" should be read in light of the terms that proceed it.[289] And Adam in my article just out a few months ago in the *Journal of Free Speech Law* argues that in fact the *ejusdem generis* approach is the better approach.[290]

And the thing that the earlier things all have in common is these are terms that have historically been used to regulate material on telecommunications media: harassing phone calls, violent television programing, lewd and *et cetera* indecent material on the internet.[291] And in fact, every single one of those terms before the otherwise objectionable, appears in at least one other portion of the Communications Decency Act, the very act that included Section 230, so that in context it shouldn't authorize platforms to remove material because it's objectionable based on its ideology but only because it's objectionable based on criteria that historically have been used as a basis for telecommunications regulation.[292]

Whether the Supreme Court will buy that or not, I have no idea. But I think Adam and I can confidently say we think that's the better approach. Once there's an underlying cause of action that the plaintiff can bring—again, the main problem for most of these plaintiffs is not Section 230(c)(2). The main problem is there's generally no underlying cause of action that restricts the platform's ability to remove things, even in the absence of (c)(2).

Hon. Barbara Lagoa: Question in the back, please.

Anthony Pericolo: Thank you. Anthony Pericolo, student at Harvard Law. One of the biggest issues I've noticed with tech is that they're supporting what I call demand-side discrimination, which is

---

(N.D. Ill. 2008) ("Implicit in [court precedent] is the conclusion that [Section 230(c)] does provide fairly absolute protection to those who choose to block.").

[289] *See* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 179 (2021) ("'[O]therwise objectionable' in § 230(c)(2) . . . . should be read as objectionable in ways 'similar in nature' to the ways that the preceding terms are objectionable." (alteration in original)).

[290] *Id.* at 178, 180 ("The provision codified at 47 U.S.C. § 230 wasn't enacted as a standalone statute: It was [S]ection 509 of the Communications Decency Act, the Act that in turn formed Title V of the Telecommunications Act of 1996.").

[291] *See* Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (1996) (forbidding "obscene, lewd, lascivious, filthy, or indecent" telecommunications).

[292] *Id.*; *see* Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 DRAKE L. REV. 1, 1–3 (1997) (describing the media's history of content moderation).

effectively this woke fiction that the hamburger or the service that I'm using is more valuable based on the race of the owner of the business or the service. And so we've seen that by Facebook and Google putting out free advertising for businesses owned by specific races. So I'm wondering can there be and should there be a class action lawsuit against these platforms for such content? And if not, does this weaken their Section 230 immunity?

Hon. Barbara Lagoa: Who would like to address that?

Prof. Randy E. Barnett: IDK.

Prof. Eugene Volokh: It's an interesting question. It's kind of tangential I think to what we've been talking about. But it's an interesting question. It all depends on whether there's an underlying cause of action.

Hon. Barbara Lagoa: Let's go to the front.

Questioner 7: Sure. Professor Barnett earlier referenced the idea that it would be acceptable to have—at least philosophically—the same rules apply to public universities and private universities in the free speech context.[293] So I think I've sued about thirty-five public universities. I've never sued a private school. I did send a nasty letter that was successful to Georgetown.

Prof. Randy E. Barnett: I'm sure it wasn't nasty enough.

[Laughter]

Questioner 7: But the reason I've never sued them is because I think the problem is if you imagine instead of Georgetown imagine a religious college, like Catholic University.

[Laughter]

Prof. Randy E. Barnett: You're talking to a nice Jewish boy up here who teaches at Georgetown.

Questioner 7: So, there are schools like Catholic University and Liberty University for whom it feels different. The reason I think that's relevant in this context is all this conversation has basically been

[293] *See supra* notes 208–214 and accompanying text.

about, you know, Facebook and Twitter and these major platforms. But things like GodTube also exist, websites that are—that clearly do have their own values that they're bringing to the conversation.

I'm wondering how the public accommodations arguments, even the common carrier arguments—how would you limit an attempt to apply those kinds of policies to them without stepping into a situation where you really do have an obvious imposition on someone else's free exercise rights, free speech rights? How do you cabin it so it's just Mark Zuckerberg who's put out and not GodTube and all the others?

Prof. Randy E. Barnett: Well, in case I was misunderstood, I was not at all proposing that universities, private universities, should be considered common carriers or public accommodations. I was not proposing that regime at all. I was just analogizing between one regime in which the First Amendment is being applied legally and another regime next to it in which it's not being applied legally. And it doesn't look that different, and it wouldn't be that onerous, for that regime to be applied over here. It would look just like UCLA does.[294] And so that was the only purpose of the analogy, not to suggest that Georgetown or any private university qualifies in that middle category I'm talking about.

Prof. Eugene Volokh: So just two datapoints that directly relate to this point including universities. California has a state statute that bans private universities from imposing speech codes.[295] And as best I can tell the skies have not fallen, and it is a restriction on private property and private entities, probably not very heavily enforced. It's there. There is an exception for religious universities and likewise for private high schools—an exception for religious high schools.[296]

One possibility is to say it's not unconstitutional to impose such mandates, but maybe we do want to maintain a different space for

[294] UCLA, FREE SPEECH ON CAMPUS: THE BASICS, THE MYTHS, THE CHALLENGES 2 (Version 1.0, 2017) ("[A]s an extension of the California government, UCLA is a state actor. So, if UCLA constrains your freedom of speech, then the First Amendment most definitely applies.").

[295] CAL. EDUC. CODE § 94367(a) (West 2009) ("No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution . . . .").

[296] *Id.* at § 94367(c) ("This section does not apply to a private postsecondary educational institution that is controlled by a religious organization . . . ."); CAL. EDUC. CODE § 48950(c) (West 2011) ("This section does not apply to a private secondary school that is controlled by a religious organization . . . .").

religious entities. One other example is *Rumsfeld v. FAIR*.[297] *Rumsfeld v. FAIR* involved—and I think this is why it's such an important addition to *PruneYard*—it involved entities that are all in the speech business: universities.[298] It involved universities, many of which were bitterly opposed to the speech they were required to host.[299] They were required to host military recruiters, and they were opposed to military recruiting because, at the time, it was discriminatory based on sexual orientation.[300]

They were getting huge pushback from their students—from many of their students, at least the activist students—demanding that they expel the recruiters.[301] They were finding themselves having to respond in some situations and say, "well, now that you're making us talk about this and you're making us host them, let's explain what our position is and such."[302] And yet, the Court unanimously said that it's permissible to impose that burden.[303]

This having been said, the Solomon Amendment is another example.[304] It actually had an exception for religious universities, although specifically focused on religious pacifist universities that might object to military recruiters because it's the military rather than because of don't ask, don't tell.[305] So again, occasionally when Congress or state legislatures enact this, they recognized that religious entities ought to be treated differently, ought to be given an extra sphere of latitude. I'm not sure it's constitutionally compelled to do so, though.

297 Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006).

298 *Id.* at 52.

299 *Id.* at 53.

300 *Id.* at 52 ("[FAIR] would like to restrict military recruiting on their campuses because they object to the policy Congress has adopted with respect to homosexuals in the military.").

301 F. for Acad. & Institutional Rts., Inc. v. Rumsfeld, 390 F.3d 219, 239 (3d Cir. 2004) ("In addition, both forms of speech with which the law schools disagree have resulted in, according to the record, hundreds (if not thousands) of instances of responsive speech by members of the law school communities (administrators, faculty, and students), including various broadcast e-mails by law school administrators to their communities, posters in protest of military recruiter visits, and open fora held to 'ameliorate' the effects of forced on-campus speech by military recruiters."); *Students Protest Pentagon Recruiters*, WASH. POST (Oct. 5, 2002), https://www.washingtonpost.com/archive/local/2002/10/05/students-protest-pentagon-recruiters/52bc31f2-cb36-4138-8dbe-dda88e032a98 (describing a student protest of military recruiters on campus).

302 *Rumsfeld*, 390 F.3d at 239 (noting that the schools are essentially forced to respond to the messages promulgated by the military recruiters).

303 *Rumsfeld*, 547 U.S. at 69–70 ("Students and faculty are free to associate to voice their disapproval of the military's message . . . . A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.").

304 10 U.S.C. § 983.

305 *See id.* (stating that universities who have a "longstanding policy of pacifism based on historical religious affiliation" are exempt from hosting military recruiters).

Hon. Barbara Lagoa: Let's do the last two speakers—the last two audience members. In the back first.

Alden Abbott: Yes, thank you. Alden Abbott, McLean, Virginia. Last July, White House Press Secretary Jen Psaki stated, regarding the potential de-platforming of certain stated views on COVID, "We're flagging problematic posts for Facebook that spread disinformation. We're working with doctors and . . . medical experts . . . who are popular with their audience[] . . . with accurate information . . . . So, we're helping get trusted content out there."[306] Does that involve sufficient government entanglement and coercion on a platform to suggest state action?

Hon. Barbara Lagoa: Who would like to address that?

Prof. Adam Candeub: Well, I don't want to in any way disagree with Eugene. It's not a good position to be in, but I think the law is a little bit less clear that there is a room for parallel action and collusion with a wink.[307] You know, when Henry II asked his barons, "Will anyone rid me of this troublesome priest?" and they—hypothetically of course—they marched down to Canterbury and killed Thomas Becket, was that state action?[308] I would say yes. [Laughter]

Under current precedent, I'm not so sure, but I think the courts could move in that direction, especially given we all know what's going on. Is there a clear threat? Is Jen Psaki saying "I'm going to come over and beat Zuckerberg up if he doesn't do this"? Well, maybe she is. I don't know.

Prof. Randy E. Barnett: I think she could take him.

Prof. Adam Candeub: Right. But the test may require a more clear quid pro quo.

Hon. Barbara Lagoa: Jane or Eugene, you want to address it? Jane, you do?

---

[306] Press Briefing, White House, Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy (July 15, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy.

[307] *See supra* note 265 and accompanying text.

[308] Joan Melloan, *On a Dark Day in Canterbury 800 Years Ago*, N.Y TIMES (Mar. 1, 1970), https://www.nytimes.com/1970/03/01/archives/on-a-dark-day-in-canterbury-800-years-ago.html ("As dusk fell that winter day, four knights in chain mail, wielding swords, cut down Thomas Becket, claiming to act on the orders of King Henry II.").

Prof. Jane Bambauer: Yeah. I'm in surprising agreement with Adam on this one. This is a surface where I think we should be taking a hard look. Well, I'll just leave it at that.

Hon. Barbara Lagoa: Okay. And then the last question from the audience.

Diana Furchtgott-Roth: Hi, I'm Diana Furchtgott-Roth from George Washington University. I just have a quick follow up on the question before about Section 230 and blocking content. Nowhere it says that under Section 230 that these companies are allowed to block speakers, only offensive content. Can you all comment on why these platforms were allowed to block President Trump? Thank you.

Hon. Barbara Lagoa: Adam, you want to take it?

Prof. Adam Candeub: Yeah. I just don't think the courts have been that sensitive to that textual difference. I mean, they've largely elided speakers and content as I read the cases.

Prof. Eugene Volokh: Well, I think that's part of it, but also there's no underlying cause of action that would keep Twitter from removing Trump's account. If there were a statute that said, you can't discriminate against speakers based on the content of their speech or the content of their past speech or whatever else, then there'd be a question of whether it's pre-empted by 230(c)(2). But I know of no public accommodation law, for example, that had been interpreted as applying to social media platforms as opposed to, say, brick and mortar outfits and the like. 230(c)(2), it's very important how it's going to be interpreted.

But the very first question is: Is there something that the defendants are doing that is said to be tortious or a violation of some statute? And I just don't think that under current law removing someone from a platform, saying you can't use our property anymore, is illegal. Maybe it should be. I just don't think it is.

Hon. Barbara Lagoa: Right. And that's why Justice Thomas's concurrence is so interesting to read because he does go through the history of public accommodation and common carriers.[309] And maybe we should be thinking about this in a different way because these

[309] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring) (discussing the history of public accommodation and common carriers).

companies are very, very different from previous companies that we've had who have all this access to information.[310] And they're the ones that wield the power in terms of that access.[311]

Thank you to the panelists and thank you to the audience members.

[310] Volokh, *supra* note 18 at 408–09 (describing how social media platforms serve varied functions as opposed to common carriers with more limited functionality).

[311] *Id.* at 385 (describing the amount of power social media platforms have).

A COUNTRY DIVIDED: REFINING THE MINISTERIAL EXCEPTION TO BALANCE AMERICA'S DIVERSITY

Richard C. Osborne III[*]

ABSTRACT

The following article proposes an alternative approach to the current ministerial exception doctrine. The lower courts routinely struggle to apply the ministerial exception, as adopted in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC *and* Our Lady of Guadalupe School v. Morrissey-Berru. *And that is because the Supreme Court's current approach is unworkable, overbroad, and confusing.*

But the need for clarity has never been greater. Bostock v. Clayton County*—which expanded discrimination protections for sexual orientation and gender identity under Title VII—will lead to increased unemployment discrimination litigation. These disputes will include a growing number of religious institutions and the selection and termination of their leaders. Thus, the ministerial exception must be reformed to balance American diversity of thought while protecting religious liberty.*

The ministerial exception should be reformed in three ways. First, courts should narrowly construe "religious institutions." A narrow definition of "religious institutions" accomplishes two things: (1) it ensures that the exception remains rooted in its historical purpose; and (2) it allows religious institutions to have broader discretion to determine who a minister is. These both act as counterweights to a rebuttable presumption approach to defining ministers.

Second, courts should use a rebuttable presumption approach to define "ministers." Courts should give religious institutions more deference to make ministerial determinations because they are generally better positioned to assess an employee's religious function. But courts cannot give complete deference to religious institutions. Thus, a rebuttable presumption approach strikes a balance. Religious institutions receive increased deference, while courts maintain a level of scrutiny over religious institutions.

Finally, courts should also implement a procedural review of ministerial exception disputes. A procedural review allows courts to ensure that religious institutions utilize fair procedures to terminate

---

[*] Candidate for Juris Doctor, Regent University School of Law. I want to thank my wife, Yoseline, for her love and support. And I also want to thank Associate Dean Bradley Lingo for his invaluable research and writing assistance, which without, this Note would not be possible.

their employees, even when the ministerial exception applies. It serves as one final safeguard against ministerial exception abuse and ensures fairness to fired employees.

The ministerial exception needs a balanced approach—one that is fair to all Americans.

TABLE OF CONTENTS

INTRODUCTION

I. THE MINISTERIAL EXCEPTION'S RELEVANCE: WHERE DOES IT APPLY?

- *A. The (Near) Limitless Spectrum*
- *B. The Inevitable Tension Caused by Employment Discrimination Laws*

II. GROUNDED IN HISTORY: THE HISTORICAL FOUNDATIONS OF THE MINISTERIAL EXCEPTION

- *A. English Religious Establishment: A Vicious and Oppressive Cycle*
- *B. American Colonies as a Safe Haven?*
- *C. The American Founders End the Vicious Cycle*

III. THE MINISTERIAL EXCEPTION'S LEGAL DEVELOPMENT: FROM LOWLY BEGINNINGS TO CONSTITUTIONAL DOCTRINE

- *A. The Ministerial Exception's Pioneers*
- *B. The Ministerial Exception's Evolution—or Not?*
- *C.* Hosanna-Tabor *and the Ministerial Exception's Consecration*
- *D. The Academic and Public Response: A Mixed Bag*
- *E.* Hosana-Tabor*'s Confusion Begets Judicial Disparity*
  1. The Current Definition of Religious Institutions
  2. The Current Definition of Ministers
- *E.* Our Lady of Guadalupe*: A Wasted Opportunity*

IV. RESPONSE TO NONVIABLE ALTERNATIVES

- *A. The Totality of the Circumstances*
- *B. The Function of the Position*
- *C. Complete Deference to Religious Institutions*
- *D. Abolition of the Ministerial Exception*

V. REFINING THE MINISTERIAL EXCEPTION: BALANCING TOLERATION AND RELIGIOUS LIBERTY

A. Reform Is Essential
B. The Balance-of-Interests Test

1. Refining Religious Institutions
2. Refining Ministers
3. Procedural Review

C. Applying the Balance-of-Interests Test to Representative Cases

1. Case One: *Hosanna-Tabor*: The Irrebuttable Presumption
2. Case Two: *Mississippi College v. EEOC*: Right Result but Overly Restrictive
3. Case Three: *Cannata v. Catholic Diocese of Austin*: Employee's Rebuttal

CONCLUSION

INTRODUCTION

The ministerial exception produces a challenging tension between "our cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other."[1] Not surprisingly, lower courts routinely struggle to apply it.[2] Although many hoped that *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[3] and *Our Lady of Guadalupe School v. Morrissey-Berru*[4] might clarify the ministerial exception's application, the struggle continues.

In fact, the need for clarity has never been greater. *Bostock v. Clayton County*[5]—which expanded discrimination protections for sexual orientation and gender identity under Title VII[6]—will lead to increased employment discrimination litigation. And these disputes

---

[1] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985).

[2] Edward G. Phillips, *Ministerial Exception Meets Its Match: Primary Duties of Secular Employees*, 46 TENN. BAR J. 32, 34 (Oct. 2010), https://www.tba.org/?pg=Article&blAction=showEntry&blogEntry=9501; Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 3 (2011).

[3] 565 U.S. 171 (2012).

[4] 140 S. Ct. 2049 (2020).

[5] 140 S. Ct. 1731 (2020).

[6] *Id.* at 1742–44.

will include a growing number of religious institutions and the selection and termination of their leaders.[7]

In *Our Lady of Guadalupe*, the Supreme Court doubled down on an untenable approach.[8] The result is a current approach that is overbroad, unworkable, and confusing. The Supreme Court must refine the ministerial exception.

This Note seeks to balance American diversity of thought while protecting religious liberty. To do so, it begins with a brief survey of the ministerial exception's broad applicability. The ministerial exception is not rooted in any substantive body of law. Instead, it applies to any law that inhibits a religious institution's ability to select and terminate its leaders freely.[9]

After, this Note examines the historical foundations of religious liberty in England that undergird the ministerial exception's existence. The ministerial exception is rooted in the purpose of the Free Exercise and Establishment clauses.[10] And these clauses were not created in isolation. America's Founders created these clauses to eliminate the vicious cycle of religious oppression in England.[11]

Next, this Note discusses the ministerial exception's legal development, from its inception in the lower courts to its adoption by the Supreme Court. After its creation in 1972, the ministerial exception developed in different directions throughout the lower courts. It grew in some circuits, while it remained the same in others. As a result, the Supreme Court stepped in and formally embraced the ministerial exception in *Hosanna-Tabor*. But lower courts struggled to apply *Hosanna-Tabor*. This confusion led to different ministerial exceptions in different places. Less than a decade later, the Court addressed the ministerial exception again in *Our Lady of Guadalupe*. Yet, instead of bringing clarity, the Court doubled down on its unworkable approach.

This Note then considers and rejects four alternative ministerial exception proposals: (1) totality of the circumstances; (2) function of the position; (3) complete deference to religious institutions; and (4) abolition of the exception. None of these approaches are viable alternatives. Each possesses at least one fatal flaw.

Finally, this Note offers a refined approach to the ministerial exception—the balance-of-interests test. America's Founders

---

[7] *See* discussion *infra* Section I (discussing the impact of anti-discrimination laws on employment practices and the ministerial exception).

[8] *Our Lady of Guadalupe*, 140 S. Ct. at 2055.

[9] *See* McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972) (describing the importance of preserving a church's ability to freely decide church matters, including the selection of ministers).

[10] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183–84 (2012).

[11] *Id.* at 182–84.

understood that government interference in ministerial selection caused instability and turbulence. Thus, the ministerial exception's purpose is to preserve religious liberty by allowing religious institutions to choose their leaders freely. But the ministerial exception is not unlimited. It should protect only as much as required to accomplish its fundamental purpose.

The ministerial exception should be reformed in three ways. First, courts should narrowly construe "religious institutions." A narrow definition of "religious institutions" accomplishes two things: (1) it ensures that the exception remains rooted in its historical purpose; and (2) it allows religious institutions to have broader discretion to determine who a minister is. These both act as counterweights to a rebuttable presumption approach to defining ministers.

Second, courts should use a rebuttable presumption approach to define "ministers." Courts should give religious institutions more deference to make ministerial determinations because they are generally in a better position to assess an employee's religious function. But courts cannot give complete deference to religious institutions. Thus, a rebuttable presumption approach strikes a balance. Religious institutions receive increased deference, while courts maintain a level of scrutiny over religious institutions.

Third, courts should also implement a procedural review of ministerial exception disputes. A procedural review allows courts to ensure that religious institutions utilize fair procedures to terminate their employees, even when the ministerial exception applies. It serves as one final safeguard against ministerial exception abuse and ensures fairness to fired employees.

Therefore, this Note seeks to refine the ministerial exception with a balanced approach—one that is fair to *all* Americans.

I. THE MINISTERIAL EXCEPTION'S RELEVANCE: WHERE DOES IT APPLY?

A. The (Near) Limitless Spectrum

The ministerial exception applies to a broad range of legal fields. This range includes claims such as condition of employment claims,[12]

[12] Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 306 (4th Cir. 2004) (holding that the Fair Labor Standards Act and Title VII are coextensive in scope and that the courts cannot intervene in employment disputes with the church).

contract disputes,[13] sexual harassment,[14] and tort claims such as defamation.[15] And at least one court has held it extended to intentional infliction of emotional distress.[16]

The ministerial exception is not confined to any aspect of substantive law.[17] Instead, the requirement to utilize the ministerial exception is that the "substance and effect" of the law must inhibit a church's ability to select and terminate its leaders freely.[18] But these broader applications arise infrequently.

B. The Inevitable Tension Caused by Employment Discrimination Laws

The ministerial exception applies most forcefully in employment discrimination disputes. These laws create a unique tension between anti-discrimination and religious freedom. This tension is inevitable. Restricting hiring practices necessarily infringes upon the right to choose employees freely.

Congress sought to eliminate employment discrimination and enacted three significant statutes: (1) the Civil Rights Act of 1964,[19] (2) the Age Discrimination in Employment Act of 1967 ("ADEA"),[20] and (3) the Americans with Disabilities Act of 1990 ("ADA").[21]

The first such statute, the Civil Rights Act of 1964, is a broad statute that prohibits employment discrimination, among other forms of discrimination.[22] The Act makes it unlawful for employers "to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[23] The Supreme Court has expanded the Civil Rights Act's prohibition of sex discrimination to include sexual orientation

---

[13] Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 123 (3d Cir. 2018) (holding that the ministerial exception barred a claim alleging that a church lacked sufficient cause to terminate its senior pastor).

[14] Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 969 (9th Cir. 2004) (holding that the plaintiff could not rely on protected ministerial exception decisions as a basis for liability under sexual harassment claims).

[15] Kaufmann v. Sheehan, 707 F.2d 355, 355–56 (8th Cir. 1983).

[16] Sumner v. Simpson Univ., 238 Cal. Rptr. 3d 207, 223 (Cal. Ct. App. 2018).

[17] Natal v. Christian & Missionary All., 878 F.2d 1575, 1577 (1st Cir. 1989) (explaining that there are First Amendment implications whenever the relationship between a church and its clergy is affected, regardless of the type of substantive law implicated).

[18] *Id.* at 1577–78.

[19] 42 U.S.C. § 2000e.

[20] 29 U.S.C. § 623.

[21] 42 U.S.C. § 12112.

[22] 42 U.S.C. § 2000e-2(a)–(b).

[23] 42 U.S.C. § 2000e-2(a)(1).

and gender identity as a protected class.[24] But the Act contains a narrow exemption for religious organizations, as it does not apply "to the employment of individuals of a particular religion to perform work connected with . . . such [religious organization]."[25]

Second, Congress enacted the ADEA to make it unlawful for an employer to "discriminate against any individual . . . because of . . . age."[26] Although a person's age may seem immune to religious exceptions, courts have held that the ADEA can conflict with the First Amendment.[27]

Third, the ADA states that no employer "shall discriminate against a qualified individual on the basis of disability."[28] A qualified individual is anyone who, "with or without reasonable accommodation, can perform the essential functions of the . . . position."[29]

Because these laws restrict hiring practices, they inevitably lead to disputes that involve selection, termination, or compensation. And because the ministerial exception insulates religious organizations' decisions regarding these employment practices, it inevitably collides with these anti-discrimination laws. These laws touch on essential and everyday aspects of life. That is why the ministerial exception must be consistent, uniform, and fair.

II. GROUNDED IN HISTORY: THE HISTORICAL FOUNDATIONS OF THE MINISTERIAL EXCEPTION

A. English Religious Establishment: A Vicious and Oppressive Cycle

First, it is necessary to understand the history that undergirds the ministerial exception. The exception is rooted in the purpose of the Free Exercise and Establishment clauses. And in turn, centuries of religious establishment in England led the Founders to implement these clauses.[30]

---

[24] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742–44 (2020).

[25] 42 U.S.C. § 2000e-1(a).

[26] 29 U.S.C. § 623(a)(1).

[27] *See* Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) ("Personnel decisions by church-affiliated institutions affecting clergy are *per se* religious matters and cannot be reviewed by civil courts."); Guinan v. Roman Cath. Archdiocese of Indianapolis, 42 F. Supp. 2d 849, 854 (S.D. Ind. 1998) ("[T]he ADEA applies to religious institutions.").

[28] 42 U.S.C. § 12112(a).

[29] 42 U.S.C. § 12111(8).

[30] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–84 (2012).

In 1215, King John signed the Magna Carta.[31] The Magna Carta provided that the "English church shall be free, and shall have its rights undiminished, and its liberties unimpaired."[32] And it approved the free election of officials within the church.[33] But this did not last. "The Act of Supremacy of 1534 made the English monarch the supreme head of the Church."[34] Moreover, the Act in Restraint of Annates authorized the King to appoint high church officials.[35] These acts prelude a long line of an oppressive religious establishment.[36]

In the reign of Queen Elizabeth I, Parliament approved the "Articles of Religion."[37] The articles provided that (1) all high church offices were royal gifts, and (2) Parliament maintained *complete* control over the church.[38] The Uniformity Act of 1662 limited ministerial service to those who formally accepted prescribed beliefs and pledged to follow a particular mode of worship.[39] The Crown deprived those who refused to pledge of any religious promotions.[40] The government viewed uniformity as a matter of civil order—religious dissent was public disorder.[41]

In the early 17th century, King Charles I issued "increasingly repressive laws against the few remaining Catholics . . . and the growing number of Protestant dissenters."[42] This continued abuse led to a Puritan revolution that ended with King Charles's execution.[43] One byproduct of this revolution was a law "declaring and constituting the People of England to be a commonwealth and free state."[44] It outlawed the establishment of the Church of England and granted religious tolerance to all Protestants but not to Catholics.[45]

---

[31] *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

[32] *Id.*

[33] *Id.*

[34] *Hosanna-Tabor*, 565 U.S. at 182 (citation omitted); *accord* G. R. ELTON, THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 331–32 (1960).

[35] *Id.*

[36] *See infra* text accompanying notes 37–50.

[37] SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 54 (1968).

[38] *Id.*

[39] *Hosanna-Tabor*, 565 U.S. at 182.

[40] *Id.*

[41] COBB, *supra* note 37, at 55.

[42] JOHN WITTE, JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 20 (4th ed. 2016).

[43] *Id.*

[44] *Id.*

[45] *Id.*

This religious tolerance experiment did not last.[46] Royal rule was restored in 1660.[47] And with it, the Crown reestablished the Church of England and again oppressed religious dissenters.[48] But after the Puritans threatened another revolution, Parliament passed the Toleration Act of 1689.[49] The Toleration Act guaranteed, yet again, freedom of worship to all Protestants.[50]

Religious establishment in England caused vicious cycles of oppression and turmoil. It often led to disorder and violence. But some American colonies looked to do better.

B. American Colonies as a Safe Haven?

The cycle of religious tolerance and oppression in England formed the backdrop of American colonial life. Colonial America provided refuge for English dissenters seeking escape from the Crown's oppressive cycle.[51]

First, the Puritans fled to New England, seeking freedom from the Church of England's iron grip over religious purity.[52] They desired free elections of ministers and control over methods of worship.[53]

Second, William Penn, the Quaker founder of Pennsylvania and Delaware, also sought independence from the Church of England.[54] The charter of Pennsylvania did not establish a religion.[55] And Penn's views on religious liberty and tolerance would later inform the Framers' views.[56]

---

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 21.

[52] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421–22 (1990).

[53] *Id.* at 1422.

[54] *See* COBB, *supra* note 37, at 440–41 (discussing William Penn's approach to religious liberty).

[55] *Id.* at 441.

[56] *See* WITTE & NICHOLS, *supra* note 42, at 22 (presenting William Penn's view on religious freedom and describing its impact on those drafting early American law).

Virginia took a different path than Pennsylvania and Massachusetts. It brought the Church of England with it.[57] But even for Virginians, the control of the Crown could be overbearing.[58]

C. The American Founders End the Vicious Cycle

The diverse range of experiences in the American colonies shaped the Founders' religious establishment views. To the Founders, religious pluralism was not merely an abstract principle of political or religious thought.[59] People needed to have freedom of conscience and free exercise of religion.[60]

James Madison noted that the Establishment Clause exists to address the fear that one religion might obtain an oppressive majority.[61] Madison believed that religious establishments never benefited religious purity.[62] On the contrary, he thought it corrupted religious purity.[63] Throughout history, religious establishments were "malignant and oppressive."[64] Madison explained that the Establishment Clause guards against political interference in religious affairs and prevents the government from opining on ministerial selection.[65]

III. THE MINISTERIAL EXCEPTION'S LEGAL DEVELOPMENT: FROM LOWLY BEGINNINGS TO CONSTITUTIONAL DOCTRINE

The Fifth Circuit established the ministerial exception in 1972.[66] The ministerial exception then developed over four decades until the

---

[57] *See* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[I]n the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches."); H.J. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 13–19 (1910).

[58] *See id.* (discussing rigid requirements and burdens placed on Virginians by the Church of England).

[59] *See* WITTE & NICHOLS, *supra* note 42, at 47 (describing the Founder's appreciation of religious pluralism).

[60] *Id.*

[61] 1 ANNALS OF CONG. 731 (1789) (Joseph Gales ed., 1834).

[62] RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 164 (1971).

[63] *Id.*

[64] *Id.*

[65] Letter from James Madison to John Carroll (Nov. 20, 1806), *in* NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/99-01-02-1094.

[66] *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972) ("Congress did not intend . . . to regulate the employment relationship between church and minister.").

Supreme Court formally embraced it as a constitutional doctrine in *Hosanna-Tabor*.[67] But lower courts struggled to apply *Hosanna-Tabor*. This confusion created significantly different ministerial exceptions. Less than a decade later, the Supreme Court again addressed the ministerial exception in *Our Lady of Guadalupe*.[68] But instead of bringing clarity, the Court merely reaffirmed *Hosanna-Tabor* and doubled down on its unworkable approach.

A. The Ministerial Exception's Pioneers

The initial case that established the ministerial exception was *McClure v. Salvation Army*.[69] There, the Salvation Army commissioned Mrs. McClure as a minister after undergoing several years of training.[70] But she believed that she received less salary and fewer benefits than her male colleagues.[71] After several complaints to superiors, the Salvation Army discharged Mrs. McClure.[72]

Mrs. McClure filed suit alleging sex discrimination.[73] The trial court held that the Civil Rights Act's statutory exception exempted Salvation Army from the Act's requirements.[74] The court found that Mrs. McClure's activities were "connected with carrying on of the religious activities."[75]

On appeal, the Fifth Circuit agreed with the lower court that the Salvation Army was exempt from Title VII.[76] But it disagreed with the lower court's reasoning.[77] The Fifth Circuit reasoned instead that the church's relationship with its ministers is its "lifeblood."[78] And if the selection of ministers is a matter of church administration insulated from judicial review, so are the details accompanying that selection.[79] A minister's compensation, assignment, and function are all matters of church administration exempted from regulation.[80] Such review would

---

[67] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[68] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

[69] 460 F.2d at 560–61.

[70] *Id.* at 555.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 556. The religious exemption states that it does not apply "to the employment of individuals of a particular religion to perform work connected with . . . such [religious organization]." 42 U.S.C. § 2000e-1(a).

[75] *McClure*, 460 F.2d at 556.

[76] *Id.* at 560.

[77] *See id.* (describing statutory interpretation to avoid issues of constitutionality).

[78] *Id.* at 558.

[79] *Id.* at 559.

[80] *Id.*

impermissibly intrude upon matters of church administration and governance.[81] Churches must be free to select and terminate their ministers.[82] Therefore, Title VII was unconstitutional as applied to the Salvation Army and Mrs. McClure.[83]

B. The Ministerial Exception's Evolution—or Not?

The ministerial exception established in *McClure* was narrow—it applied only to churches and their ministers.[84] But shortly after, the Fourth Circuit expanded the exception beyond ordained ministers in *Rayburn v. General Conference of Seventh-Day Adventists*.[85] Carole Rayburn was a female member of the Seventh-Day Adventist Church.[86] She unsuccessfully applied for a pastoral internship and a pastoral staff position.[87] Rayburn believed that the church rejected her because of her sex, so she sued the church, alleging sex discrimination.[88]

The court rejected Rayburn's claim.[89] It held that the ministerial exception depends on the position's function—not the employee's ordination.[90] In these "'quintessentially religious' matters," the First Amendment protects a church's decision and bars inquiry into the motivation behind it.[91] Therefore, because of the positions' religious function, the ministerial exception barred Rayburn's claim.[92]

After *McClure* and *Rayburn*, the ministerial exception diverged before it reached the Supreme Court. First, the Fifth Circuit rejected *Rayburn* in *EEOC v. Mississippi College* when it remained faithful to its original church-minister limitation.[93]

The Mississippi Baptist Convention owned Mississippi College.[94] Ninety-five percent of its faculty and eighty-eight percent of its students were Baptist.[95] Moreover, its undergraduate curriculum

---

[81] *Id.* at 560.

[82] *Id.*

[83] *See id.* (explaining that the First Amendment prohibits state encroachments into matters of religious freedom).

[84] *Id.* at 560–61.

[85] 772 F.2d 1164 (4th Cir. 1985).

[86] *Id.* at 1165.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1169.

[90] *Id.* at 1168–69.

[91] *Id.* at 1169 (quoting Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 720 (1976)).

[92] *Id.*

[93] 626 F.2d 477 (5th Cir. 1980).

[94] *Id.* at 478.

[95] *Id.* at 479.

required all students to take two courses in Bible study.[96] It also required all students to attend weekly chapel meetings.[97]

The college hired Dr. Patricia Summers as an assistant professor in psychology.[98] After a full-time position opened, the school did not consider Dr. Summers for the position.[99] The school told her that it was seeking a candidate with an experimental psychology background.[100] Dr. Summers then filed a sex discrimination claim against the college.[101]

The court distinguished this case from *McClure*.[102] Although the college was religiously affiliated, it was not a church.[103] Likewise, although almost every faculty member was Baptist, they were not ministers.[104] "They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine."[105] The court refused to extend the ministerial exception beyond ordained ministers and churches.[106]

But the Third Circuit plotted its own course in *Petruska v. Gannon University*.[107] There, the court expanded the ministerial exception beyond *Rayburn* by including religious institutions instead of merely churches.[108]

Petruska involved a Catholic college that promoted a woman to serve as its University Chaplain.[109] After the interim chaplain resigned, Gannon University's President promoted Petruska to be the University's first female chaplain.[110] Because Petruska was the first female chaplain, the University's President assured Petruska that he would make employment decisions based solely on her performance, not her gender.[111]

Shortly after, the University President resigned due to misconduct, and the University attempted to cover it up.[112] Petruska

---

[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 485.
[103] *Id.*
[104] *Id.* at 479, 485.
[105] *Id.* at 485.
[106] *Id.*
[107] 462 F.3d 294 (3d Cir. 2006).
[108] *See id.* at 306–07 (describing the protections the First Amendment affords institutions to decide matters of doctrine, faith, and governance).
[109] *Id.* at 299–300.
[110] *Id.*
[111] *Id.* at 300.
[112] *Id.*

"strenuously" objected to the University's failed response.[113] The Bishop ordered Acting President Ostrowski to remove Petruska as the University Chaplain.[114] But after Ostrowski would not fire Petruska, Gannon restructured its leadership in order to remove her.[115] Petruska then sued Gannon for sex discrimination.[116]

The court held that a church must be free to express its religious beliefs, profess matters of faith, and communicate its religious message.[117] And the ministerial exception bars any claim that requires the court to limit a religious institution's right to select its leaders freely.[118] It is not limited to merely churches.[119] In this case, the ministerial exception insulated Gannon's decision to terminate Petruska from judicial review.[120] Thus, the court expanded the ministerial exception beyond merely churches and ordained ministers.[121]

Three versions of the ministerial exception existed before it reached the Supreme Court in *Hosanna-Tabor*. One ministerial exception was limited to churches and ordained ministers.[122] Another exception included not only ordained ministers but also employees who performed important religious functions.[123] And finally, the third exception applied to religious institutions, not merely churches.[124] Thus, the Supreme Court intervened in *Hosanna-Tabor*.

C. Hosanna-Tabor *and the Ministerial Exception's Consecration*

In 2012, the Supreme Court finally weighed in on the ministerial exception in *Hosanna-Tabor*.[125] There, the Court unanimously adopted the ministerial exception as a constitutional doctrine.[126]

---

[113] *Id.*

[114] *Id.*

[115] *Id.* at 300–01.

[116] *Id.* at 301–02.

[117] *Id.* at 306–07.

[118] *Id.* at 307.

[119] *See id.* (explaining the broader protection of religious institutions to decide who carries out religious functions).

[120] *Id.* at 307–08.

[121] *See id.* (explaining the application of the ministerial exception because of the spiritual functions performed by Petruska despite her not being an ordained minister).

[122] EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980).

[123] Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985).

[124] *Petruska*, 462 F.3d at 307.

[125] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[126] *Id.* at 196. The opinion tracked the reasoning used in cases like *Rayburn* and *Petruska*, focusing on the functionality of the position in a totality-of-the-circumstances

Hosanna-Tabor was a religious school and a member of the Lutheran Church-Missouri Synod.[127] The Synod classifies two categories of teachers: "called" and "lay."[128] The church regards called teachers as "having been called to their vocation by God through a congregation."[129] Called teachers must meet specific academic requirements.[130] They also serve an open-ended term.[131] Only a supermajority of the congregation can recall a called teacher.[132] Conversely, lay teachers are appointed by the school board and serve one-year renewable terms.[133]

Cheryl Perich served as a called teacher at Hosanna-Tabor.[134] But she was diagnosed with narcolepsy, a disorder that causes sudden and deep periods of sleep.[135] Because of her disability, the congregation offered Perich a "peaceful release" from her call—but Perich refused to resign.[136] The school then prevented Perich from returning to work.[137] In response, Perich threatened legal action, which alarmed the school and the congregation.[138] So the congregation rescinded her call because of "insubordination and disruptive behavior."[139]

The Supreme Court held that the Religion Clauses prohibit government interference with a religious group's right to select its leaders and representatives.[140] The government cannot require a church to accept or retain unwanted ministers, nor can it punish churches that fail to do so.[141]

The Court rejected a "rigid formula."[142] Instead, it held that the ministerial exception barred Perich's claim.[143] The Court looked to the "totality-of-the-circumstances" to assess whether the ministerial

---

test. *See id.* at 192 (reviewing the varied religious functions of Perich's job including teaching religion, praying with students, leading devotional exercises, and leading a chapel service).

[127] *Id.* at 177.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 178.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 179.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 184.

[141] *Id.* at 187–89.

[142] *Id.* at 190.

[143] *Id.* at 192.

exception applied.[144] Six factors informed the Court's decision: (1) Hosanna-Tabor held Perich out as a minister; (2) Hosanna-Tabor required Perich to work "according to the Word of God"; (3) Hosanna-Tabor periodically reviewed Perich's ministerial performance and provided her with religious education; (4) Perich's title was "Minister of Religion, Commissioned"; (5) Perich's title reflected a significant degree of religious training; and (6) Perich held herself out as a minister.[145]

In dictum, the Court critiqued the Sixth Circuit's application of the ministerial exception.[146] First, the lower court ignored Perich's status as a commissioned minister.[147] Second, the lower court placed excessive weight on the similarity between called and lay teachers' duties.[148] And third, the lower court placed undue weight on Perich's secular duties.[149]

Thus, the Supreme Court embraced an expanded ministerial exception in *Hosanna-Tabor*. The Court did not limit the exception to merely churches or ordained ministers. Instead, courts must consider all relevant circumstances to determine whether the ministerial exception applies. The Court left the exception's limits undefined. And this amorphous approach caused significant confusion in the lower courts.

D. The Academic and Public Response: A Mixed Bag

Following *Hosanna-Tabor*, the public debated the ministerial exception's legitimacy and breadth. Critics challenged *Hosanna-Tabor*, arguing the ministerial exception was too broad.[150] There was no religious significance to the church's decisions "because the Lutheran Church does not teach that disabled people cannot be ministers."[151] Therefore, critics argued that the ministerial exception should not protect decisions that do not involve religious beliefs.[152]

---

[144] *See id.* at 190 (stating that all circumstances of the employment were taken into consideration).

[145] *Id.* at 191.

[146] *Id.* at 192–93.

[147] *Id.*

[148] *Id.* at 193.

[149] *Id.*

[150] *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 850 (2012) (stating that critics of the ministerial exception have argued that the exception should not apply where there is no religious significance to a church's decision).

[151] *Id.*

[152] *Id.*

Others argued that the Court wrongly decided *Hosanna-Tabor* under *Employment Division v. Smith*.[153] But the Court rejected this idea.[154] The Court distinguished *Smith*, noting that *Smith* involved government regulation of "only outward physical acts."[155] Conversely, the ministerial exception relates to government interference with an "internal church decision that affects the faith and mission of the church itself."[156]

Constitutional scholar Douglas Laycock disagreed with these critics.[157] He argued that such a view misunderstands or ignores the ministerial exception's fundamental purpose—that the evaluation of a minister is inherently religious.[158] It is immaterial whether the dispute depends on a religious doctrine or an employer's judgment.[159] The ministerial exception protects a church's right to choose its ministers freely.[160]

Likewise, the broader religious community supported *Hosanna-Tabor*.[161] They believed the decision was a tremendous victory for religious freedom.[162] But others in the community had more tempered reactions.[163] As much as the Court gave religious liberty a victory, it equally left much undecided.[164] The Court failed to address all of the ministerial exception's questions, including its limitations.[165]

[153] *Id.* at 854. *Smith* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 879 (1990) (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

[154] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

[155] *Id.*

[156] *Id.*

[157] Laycock, *supra* note 150, at 850–51.

[158] *Id.*

[159] *Id.* at 851.

[160] *Id.*

[161] *See* Michael Stokes Paulsen, *Hosanna in the Highest!*, PUB. DISCOURSE: THE J. OF THE WITHERSPOON INST. (Jan. 12, 2012), www.thepublicdiscourse.com/2012/01/4541 (describing the ruling in a positive light).

[162] *Id.*

[163] *See* Richard W. Garnett & John M. Robinson, Hosanna-Tabor, *Religious Freedom, and the Constitutional Structure*, CATO SUP. CT. REV. 2011–2012, at 323 (speaking of the ruling in a cautious, skeptical light).

[164] *Id.*

[165] *Id.*

E. Hosanna-Tabor*'s Confusion Begets Judicial Disparity*

Instead of increased clarity after *Hosanna-Tabor*, the ministerial exception splintered again.[166] The lower courts struggled to apply *Hosanna-Tabor* in two significant ways: (1) the definition of a religious institution, and (2) the definition of a minister.

1. The Current Definition of Religious Institutions

One issue left unanswered in *Hosanna-Tabor* was the definition of a "religious institution."[167]

In *Shaliehsabou v. Hebrew Home of Greater Washington*, the Fourth Circuit defined a "religious institution" as any entity whose "mission is marked by clear or obvious religious characteristics."[168] And in *Conlon v. InterVarsity Christian Fellowship / USA*, the Sixth Circuit followed *Shaliehsabou*.[169] InterVarsity Christian Fellowship ("IVCF") was an evangelical campus mission whose purpose was to advance Christianity on college campuses.[170] The court held that IVCF qualified as a religious institution because of its Christian ministry and teaching.[171] The ministerial exception does not require an employer to be a church, diocese, or synagogue.[172] Like *Shaliehsabou*, a religious entity is one whose "mission is marked by clear or obvious religious characteristics."[173]

But the Second Circuit rejected this approach in *Penn v. New York Methodist Hospital*.[174] The court instead looked to the nature of the relationship between the employer and employee.[175] *Penn* involved a hospital founded by the United Methodist Church in 1881.[176] The hospital later amended its certificate of incorporation to remove "all reference to its 'Church related character' and 'relationship with The United Methodist Church.'"[177] Yet the hospital maintained a

---

[166] *See* discussion *infra* Sections III.E.1–2.

[167] The Court also left this issue unresolved after *Our Lady of Guadalupe*. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004) (defining "religious institution" in absence of a Supreme Court definition from either *Hosanna-Tabor* or *Our Lady of Guadalupe*).

[168] *Id.*

[169] 777 F.3d 829, 834 (6th Cir. 2015).

[170] *Id.* at 831.

[171] *Id.* at 834.

[172] *Id.*

[173] *Id.* (quoting Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004)).

[174] 884 F.3d 416, 424–25 (2d Cir. 2018).

[175] *Id.* at 423.

[176] *Id.* at 418.

[177] *Id.*

Department of Pastoral Care to "see that the needs of the whole person . . . are met."[178]

Despite the hospital eliminating any religious affiliation, the court still held that the hospital qualified as a religious institution.[179] To determine whether the employer is a religious institution, the court must consider "the relationship between the activities the employee performs for her employer, and the religious activities the employer espouses and practices."[180] Because the hospital employed Mr. Penn in the Department of Pastoral Care—a department performing a religious function—the hospital qualified as a religious institution in this case.[181]

After *Hosanna-Tabor*, there are two significantly different approaches to defining religious institutions. And both approaches can lead to different results. The definition of religious institutions acts as the "gate" to the ministerial exception. It demands uniformity. The Supreme Court should resolve this disparity.

2. The Current Definition of Ministers

Courts have also struggled to determine who is a "minister." Lower courts adopted four main approaches after *Hosanna-Tabor*. There was (1) the "function-of-the-position" test,[182] (2) the "formal-title-and-function-of-the-position" test,[183] (3) the "four-factor" test,[184] and (4) the "four-element" test.[185]

Initially, the Fifth Circuit adopted a function-of-the-position analysis to determine whether an employee was a minister in *Cannata v. Catholic Diocese of Austin*.[186] There, Cannata served as the Music Director at a Catholic church.[187] He oversaw the Music Department's budget, managed the sound systems at church, rehearsed with the choir members, and played piano during services.[188] But the church

[178] *Id.* at 419–20.

[179] *Id.* at 424.

[180] *Id.* at 423 (quoting Fratello v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017)).

[181] *Id.* at 424.

[182] Cannata v. Cath. Diocese of Austin, 700 F.3d 169, 175 (5th Cir. 2012). The court decided *Cannata* after *Hosanna-Tabor*.

[183] Conlon v. InterVarsity Christian Fellowship/USA, 777 F.3d 829, 834–35 (6th Cir. 2015).

[184] *Fratello*, 863 F.3d at 205–06.

[185] Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019).

[186] 700 F.3d at 177.

[187] *Id.* at 170–71.

[188] *Id.* at 171.

gave another individual liturgical responsibility.[189] The court noted that *Hosanna-Tabor* rejected a formal or rigid approach.[190] Instead of looking for a formal title, the court should consider the employee's function.[191] In this case, the court found that Cannata was a minister because of his integral role in the celebration of Mass and because he furthered the church's mission.[192]

Similarly, the Sixth Circuit adopted a formal-title-and-religious-function test in *Conlon v. InterVarsity Christian Fellowship/USA*.[193] *IVCF* involved a religious organization seeking to advance Christianity across college campuses.[194] Conlon served as an IVCF Spiritual Director.[195] Following *Hosanna-Tabor*, the court held that Conlon's "Spiritual Director" title sufficiently met the religious title requirement.[196] And likewise, Conlon's position performed a ministerial function.[197] Therefore, Conlon qualified as a minister.[198] But the court refused to decide whether an employee could be a minister with only a formal title or only a religious function.[199]

Next, the Second Circuit adopted a four-factor test in *Fratello v. Archdiocese of New York*.[200] *Fratello* involved a Catholic school that declined to renew its principal's employment contract.[201] Principals at St. Anthony's School are responsible for maintaining and overseeing many religious and spiritual practices.[202] The court considered four factors to determine if Fratello was a minister: (1) a formal title; (2) the substance reflected in the title; (3) the employee's use of the title; and (4) the religious function performed.[203] The court found that only the formal religious title factor weighed against ministerial status.[204] Aside from that, Fratello performed various religious functions, and the community perceived her as a religious leader.[205] It is also expected

---

[189] *Id.*
[190] *Id.* at 176.
[191] *Id.*
[192] *Id.* at 177.
[193] 777 F.3d 829, 834–35 (6th Cir. 2015).
[194] *Id.* at 831.
[195] *Id.*
[196] *Id.* at 834.
[197] *Id.* at 835.
[198] *Id.*
[199] *Id.*
[200] 863 F.3d 190, 205–06 (2d Cir. 2017).
[201] *Id.* at 192.
[202] *See id.* at 193–95 (describing the responsibilities of a principal).
[203] *Id.* at 206–08.
[204] *Id.* at 206.
[205] *Id.* at 209.

that a Catholic school principal is committed to the Catholic Church's teachings.[206] Therefore, Fratello qualified as a minister.[207]

Finally, the Ninth Circuit employed a four-element test to resolve ministerial issues.[208] The court used four elements: (1) formal title; (2) religious credentials, training, or background; (3) personal representation as a minister; and (4) religious function.[209] But unlike *Fratello*, the court required all four elements to be satisfied for an employee to qualify as a minister.[210]

Hosanna-Tabor's confusion created four significantly different ministerial exceptions. The lower courts need clarification. But the Court missed its opportunity to provide judicial clarity in *Our Lady of Guadalupe*.

F. Our Lady of Guadalupe*: A Wasted Opportunity*

Only eight years after *Hosanna-Tabor*, the Court again addressed the ministerial exception.[211] But unfortunately, the Court wasted the opportunity. Instead, it used the opportunity to double-down on its confusing *Hosanna-Tabor* approach. It is unlikely *Our Lady of Guadalupe* will resolve the confusion and disparity concerning the ministerial exception's unworkability.

In *Our Lady of Guadalupe*,[212] Agnes Morrissey-Berru worked for Our Lady of Guadalupe School as a lay fifth-and sixth-grade teacher.[213] She taught secular and religious topics.[214] Morrissey-Berru took continuing religious education courses, and the school expected her to attend faculty prayer services.[215] Her employment agreement also acknowledged the school's mission "to develop and promote a Catholic School Faith Community."[216] The school required her to perform all of her duties according to that Catholic mission.[217] Moreover, she taught

---

[206] *Id.* at 208.
[207] *Id.* at 209.
[208] Morrissey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 460–61 (9th Cir. 2019).
[209] *Id.* at 461.
[210] *Id.*
[211] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).
[212] *Our Lady of Guadalupe* involved two combined cases. But this Note analyzes only one set of facts. The alternative facts are nearly identical. *Id.* at 2058–59.
[213] *Id.* at 2056.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*

her students "to learn and express belief that Jesus is the son of God and the Word made flesh."[218]

The Court reiterated its holding in *Hosanna-Tabor*, noting that religious institutions do not enjoy a general immunity from secular laws.[219] Instead, the ministerial exception protects only autonomy over internal decisions essential to a church's central mission.[220] Although *Hosanna-Tabor* identified four relevant "factors," the Court never highlighted any as essential.[221] Ultimately, "what matters [most] . . . is what an employee does."[222]

Although Morrissey-Berru did not have a formal religious title, she performed critical religious functions.[223] She educated and formed students in the Catholic faith, prayed with students, and prepared students for religious activities.[224] The school also viewed Morrissey-Berru as fulfilling vital religious functions.[225]

In dictum, the Court criticized the Ninth Circuit's four-element test.[226] First, the approach fails to consider all relevant circumstances.[227] Second, it places undue significance on a formal clerical title.[228] And third, the approach assigns too much weight to an employee's religious education or training.[229]

Like *Hosanna-Tabor*, the Court's holding in *Our Lady of Guadalupe* sparked public outcry over the ministerial exception's continued use.[230] Critics argued that the ministerial exception

---

[218] *Id.* at 2057.

[219] *Id.* at 2060; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (explaining the limits of the Free Exercise clause and its relationship with the ministerial exception).

[220] *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

[221] *Id.* at 2062 (citing *Hosanna-Tabor*, 565 U.S. at 191–92).

[222] *Id.* at 2064.

[223] *See id.* at 2066 (explaining that Morrissey-Berru had the same responsibility to teach religion as a minister and that she played a vital role in carrying out the mission of the church).

[224] *Id.*

[225] *Id.*

[226] *See id.* at 2067 (criticizing the Ninth Circuit's test as producing a distorted analysis).

[227] *Id.*

[228] *Id.*

[229] *Id.* at 2067–68.

[230] *See* David Crary & Elana Schor, *Double Win at Supreme Court Elates Religious Conservatives*, WASH. POST (July 11, 2020), https://www.washingtonpost.com/national/religion/correction-supreme-court-religious-exemption-story/2020/07/11/4bcff098-c37e-11ea-8908-68a2b9eae9e0_story.html (documenting criticism of the ruling from both within and without the Catholic church); Ian Millhiser, *The Supreme Court Stripped Thousands of Teachers of Their Civil Rights*, VOX (July 8, 2020), https://www.vox.com/2020/7/8/21317223/supreme-court-ministerial-exception-religion-morrissey-berru-samuel-alito, (predicting that the ministerial exception will remove protections against discrimination from all teachers in religious schools).

transformed the First Amendment from a shield into a sword for "politically powerful Christian conservatives . . . to strike down hard-fought advances in civil rights."[231] They argue that today, the ministerial exception allows religious organizations to discriminate with impunity.[232] To require "religious people in the ordinary course of their lives to follow the rules that apply to everyone else is not hostility; it is equality."[233]

Unfortunately, *Our Lady of Guadalupe* fails to increase judicial clarity. It was a missed opportunity. At its best, it will instruct courts on what they *cannot* do, not what they *must* do. The Court must do better in the future.

IV. Response to Nonviable Alternatives

There are four major alternative approaches to the ministerial exception: (1) totality of the circumstances; (2) function of the position; (3) complete deference to religious institutions; and (4) abolition of the exception. But each suffers from at least one fatal flaw. These approaches are not viable, and they are not the solution.

A. The Totality of the Circumstances

The totality-of-the-circumstances test is the current approach adopted in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[234] This approach's fatal flaw is confusion. Courts cannot uniformly and consistently apply this test.[235] The Supreme Court may enjoy being free from the shackles of precedent, but it comes at a cost. The current ministerial exception is unworkable for the lower courts who must resolve these disputes. Fundamental constitutional rights demand uniformity and clarity, especially in cases that directly collide with an individual's right to be free from discrimination.

---

[231] Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, THE ATL. (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/.

[232] *Id.*

[233] *Id.*

[234] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (finding a ministerial exception existed based on the circumstances surrounding the employment); *Our Lady of Guadalupe*, 140 S. Ct. at 2067 (explaining that courts should take all relevant circumstances into account when evaluating a potential ministerial exception).

[235] *See* discussion *supra* Section III.E.2.

B. The Function of the Position

Justices Alito and Kagan advocated for the function-of-the-position test in their concurrence in *Hosanna-Tabor*.[236] "[R]eligious groups must be free to choose the personnel who are essential to the performance of these [vital] functions."[237] The ministerial exception must be tailored to this purpose. "It should apply to any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[238]

This test has many benefits—it is objective, and it emphasizes essential religious functions. But it is not perfect. It is both overbroad and underinclusive. It fails to account for cases—like *Hosanna-Tabor*—where the employee holds herself out as a minister.[239] Yet it may also "shortchange" employees. Under this Note's proposed approach, employees may also rebut ministerial status if they demonstrate that the employer did not view the employee as a minister. This option may prove invaluable to employees when the function-of-the-position test may favor the employer. Therefore, despite its benefits, the function-of-the-position approach would not adequately balance competing rights and interests.

C. Complete Deference to Religious Institutions

Justice Thomas believes that religious entities should have *complete* deference.[240] He argues that "the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[241] Thus, the Court should defer entirely to religious organizations and avoid establishment issues.[242]

This approach's flaw is apparent. Instead of balancing religious interests and diversity of thought, it allows religious organizations to discriminate with impunity. So long as the religious employer makes

---

236 *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

237 *Id.* at 199.

238 *Id.*

239 *Id.* at 191 (majority opinion). Perich accepted a special ministerial tax status. *Id.* at 191–92. ("[S]he claimed a special housing allowance on her taxes that was available only to employees earning their compensation 'in the exercise of the ministry.'").

240 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069–70 (2020) (Thomas, J., concurring) (stating that courts should defer to religious institutions' good-faith claims that an employee's position is ministerial).

241 *Id.*

242 *Id.* at 2071.

good faith decisions, the employee cannot challenge the decision. Although religious organizations may be better positioned to determine religious function, they cannot be the final arbiters of their own case. It would contravene the fundamental principles of justice and undermine anti-discrimination laws.

D. Abolition of the Ministerial Exception

Some ministerial exception critics challenge the exception's historical understanding and argue that it should not exist.[243] They believe the selection of history is arbitrary.[244] After the sixteenth century, the English government increasingly subjected the church to the rule of law.[245] And in the United States, the church was never above the jurisdiction of the courts.[246] Americans in the Founding viewed religion as "a voluntary affair, a matter of individual free choice."[247] For courts to use a truncated view of "English history to overcome civil rights legislation approved by Congress defies the rule of law."[248]

To abolish the ministerial exception would follow Justice Thomas down an intolerable path, only this time, on the opposite end of the spectrum. The First Amendment is a fundamental enumerated right. Congress cannot eliminate the First Amendment's protections. Religious institutions must be able to select their leaders and representatives freely.

V. REFINING THE MINISTERIAL EXCEPTION: BALANCING TOLERATION AND RELIGIOUS LIBERTY

A. Reform Is Essential

After *Hosanna-Tabor*, courts struggled to interpret the Court's holding. The totality-of-the-circumstances approach caused great confusion. Some courts emphasized certain factors while others did not. Yet in each case, these courts all wrestled to apply *Hosanna-Tabor*. And *Our Lady of Guadalupe* is unlikely to increase judicial clarity. The Court doubled-down on the same unworkable approach. This confusion cannot continue. *Bostock v. Clayton County* will significantly increase

243 *See* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 988–89 (2013) (criticizing the ministerial exception as stemming from an over-simplified mashup of history).

244 *Id.* at 988.

245 *Id.*

246 *Id.*

247 *Id.* at 989.

248 *Id.* at 990.

employment discrimination litigation involving religious institutions. These litigants deserve a fair and uniform approach.

Without a straightforward test that provides some rigidity to an otherwise amorphous approach, the ministerial exception will continue to have different meanings depending on the litigants' location. Crucial and fundamental constitutional rights that significantly impact everyday life cannot be subject to such significant variation.

The following proposal seeks to demonstrate an alternative to the vague "all-circumstances" approach. It instead offers one that balances the need to end discrimination while still protecting religious liberty. It strives for fairness. This approach is rooted in the historical purpose of the First Amendment. It offers courts more rigidity than the current approach. Religious institutions *should not* have licenses to discriminate. Yet these institutions *must* remain free to choose who will represent their cherished beliefs to the world.

B. The Balance-of-Interests Test

Based on the First Amendment's historical purpose, the ministerial exception should afford religious institutions some discretion. From the Magna Carta to the American colonies, government interference in ministerial selection obliterated tolerance and diversity of thought. The Framers recognized that control over churches' ministers caused a cycle of instability and turbulence. The First Amendment sought to end that cycle. The ministerial exception's purpose is to protect against establishment and preserve free exercise by allowing religious institutions to choose their leaders. Thus, it should protect only as much as required to accomplish that purpose. Otherwise, it risks creating a de facto establishment.

1. Refining Religious Institutions

The historical background undergirding the ministerial exception demands a narrow construction of "religious institutions." The religion clauses sought to prevent the government from choosing religious officials. An inability to choose ministers freely led to conflict, and conflict bred chaos and disorder. The Framers sought to end the cycle of religious tension by prohibiting state involvement in ministerial decisions.

Courts must be careful and thoughtful in how they determine which religious institutions qualify for the ministerial exception. The definition of "religious institutions" acts as the "door" to access the ministerial exception. The more narrow the door is, the more narrow the exception. If courts narrow this door, it will accomplish two things.

First, it will ensure that the ministerial exception remains rooted in its historical purpose. And second, it allows courts to give religious institutions more discretion in determining who a minister is. Both act as a counterweight to a rebuttable presumption approach to defining ministers.

Although it is difficult to define a religious institution, the door must be narrower. Any entity whose "mission is marked by clear or obvious religious characteristics" is far too broad.[249] Privately owned Christian businesses are the quintessential example of entities that may qualify as a religious institution under this broad definition. But this owner's inability to prohibit a gay person from working for him does not threaten the ministerial exception's historical foundation. The definition of religious institutions should include only those institutions whose inability to choose its "ministers" freely would threaten to undermine the religion clauses' purpose.[250]

Thus, courts must narrowly construe "religious institutions." To do so, courts should adopt the *Penn* approach. Instead of looking at an organization's general characteristics, the court must consider "the relationship between the activities the employee performs for her employer, and the religious activities the employer espouses and practices."[251] If the relationship involves religious characteristics, then the employer should qualify as a religious institution. For example, consider a religious school's employee who works in the school's theology department. In that example, the employer qualifies as a religious institution because the theology department performs religious functions. But if the employee instead works in the psychology department, the employer no longer qualifies as a religious institution. There, the psychology department does not perform religious functions. Thus, the court's focus is on the *relationship* between the employer and employee, not the functions the employee performs.[252]

Although this approach may include some institutions that would not have otherwise qualified, it will reduce the overall number of qualifying institutions. The *Penn* approach is a narrow construction of "religious institutions." And courts should use it to limit the ministerial exception's application to its intended purpose.

---

[249] Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004).

[250] A separate jurisprudence governs this business owner's free exercise rights, which is not the focus of this Note. The ministerial exception cannot be used to circumvent free exercise jurisprudence.

[251] Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 423 (2d Cir. 2018) (quoting Fratello v. Archdiocese of N.Y., 863 F.3d 190, 205 (2d Cir. 2017)).

[252] *See* discussion *infra* Section V.C.2.

2. Refining Ministers

Religious institutions are generally in a better position to assess an employee's spiritual functions and necessity. And courts should give them some deference. When courts enquire into religious functions, they engage in the unconstitutional analysis that created the ministerial exception. But courts cannot give complete deference to religious institutions.[253]

In resolving ministerial exception disputes, the court must first determine whether the employee views himself as a "minister"—as someone who provides essential religious services. If the employee viewed himself as a minister, then it should create an *irrebuttable* presumption. Employees who view themselves as providing essential religious functions should not turn to the courts for recourse when their ministerial status becomes inconvenient.

If the employee does not view himself as a minister, then the court must determine whether (1) the religious institution viewed the employee as a minister or (2) the employee performed important religious functions. If either is true, then a *rebuttable* presumption should be created in favor of the religious institution. But if neither is shown, then the ministerial exception should not attach. The court should hear the case.

Next, if there is a rebuttable presumption, then the burden of production shifts to the employee.[254] The employee has two options. First, the employee can show that the employer did not view him as a minister—that is, as someone who performed important religious duties. Alternatively, the employee can demonstrate that he did not perform important religious functions. If the employee meets the burden of production, then the ministerial exception should not bar the claim, and the court should hear the case. Otherwise, the ministerial exception should attach, and it should bar the claim.

But courts *must* strictly construe "vital" and "important," for it is only these employment positions that collide with the First Amendment. A broad construction would contravene the ministerial exception's purpose. It is insufficient that firing an employee may prove convenient or ease congregational tension. The court must ensure that the employee truly performs important religious functions.

Although a rebuttable presumption approach may be new to the ministerial exception, it is not new to the law. Courts and legislatures

---

[253] See discussion *supra* Section IV.C., for an explanation as to why religious institutions cannot be the final arbiters of their own case.

[254] The burden of persuasion always belongs to the plaintiff. Schaffer *ex rel.* Schafer v. Weast, 546 U.S. 49, 57 (2005).

use rebuttable presumptions in many legal contexts, such as child custody,[255] property ownership,[256] corporate officers' decisions,[257] and many more. Nor are rebuttable presumptions new to employment and labor law. Rebuttable presumptions are also used to resolve disability[258] and age discrimination disputes.[259] And most recently, states have employed rebuttable presumptions in COVID-19 related workers' compensation.[260] Rebuttable presumptions work. A rebuttable presumption approach simplifies the ministerial exception. And it makes the ministerial exception easier to apply, more uniform, and more fair.

3. Procedural Review

Courts should also engage in a procedural review of ministerial exception disputes even if the ministerial exception prohibits a merits

---

[255] *See, e.g.*, IOWA CODE ANN. § 598.41(1)(b), (2)(c) (West, Westlaw through the legis. from the 2021 Second Extraordinary Sess.); IDAHO CODE ANN. § 32-717B (4) (West, Westlaw through Chapters 1 to 364 and S.J.R. No. 102 of the 2021 First Reg. Sess. of the 66th Idaho Leg.) ("[T]here shall be a presumption that joint custody is in the best interests of a minor child or children."); LA. STAT. ANN. § 9:335(B)(3) (West, Westlaw through 2021 Reg. Sess. and Veto Sess.).

[256] *See, e.g.*, S.C. CODE ANN. § 62-2-805(A) (West, Westlaw through 2021 Act No. 117) ("[T]angible personal property in the joint possession or control of the decedent and the surviving spouse at the time of the decedent's death is presumed to be owned by the decedent and the decedent's spouse in joint tenancy with right of survivorship if ownership is not evidenced otherwise by a certificate of title, bill of sale, or other writing."); TENN. CODE ANN. § 66-3-103 (West, Westlaw through laws from the 2021 Third Extraordinary Sess. of the 112th Tenn. Gen. Assemb.).

[257] *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("The [business judgment rule] is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."); Shlensky v. Wrigley, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) ("The judgment of the directors of corporations enjoys the benefit of a presumption that it was formed in good faith and was designed to promote the best interests of the corporation they serve.").

[258] *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 406 (2002) ("[A] showing that the [disabled employee's] assignment would violate the rules of a seniority system warrants summary judgment for the employer—unless there is more. The plaintiff must present evidence of that 'more,' namely, special circumstances surrounding the particular case that demonstrate the assignment is nonetheless reasonable.").

[259] *See* France v. Johnson, 795 F.3d 1170, 1174 (9th Cir. 2015) ("[W]e adopt [a] rebuttable presumption approach. We hold that an average age difference of ten years or more between the plaintiff and the replacements will be presumptively substantial, whereas an age difference of less than ten years will be presumptively insubstantial.").

[260] *See, e.g.*, S.B. 2380, 219th Gen. Assemb. (N.J. 2020), https://legiscan.com/NJ/text/S2380/id/2209796/New_Jersey-2020-S2380-Chaptered.html ("[T]here shall be a rebuttable presumption that the contraction of the disease is work-related and fully compensable"); S.B. 1159, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (Westlaw) ("[Contraction] is presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence.").

review. Courts should ensure that religious institutions utilize fair procedures when they terminate employees.

Virginia courts engage in ministerial exception procedural review.[261] Virginia adopted its own ministerial exception based on its own constitution.[262] Thus, Virginia courts cannot resolve disputes regarding the merits of the selection or termination of a church's pastor.[263]

But Virginia *does* allow for procedural review. An individual can challenge the employer's procedure used to reach its decision.[264] This review includes "the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes."[265] "The[se] are neutral principles of law."[266] In other words, religious institutions must adhere to the "notions of due process."[267]

This procedural review serves as one final safeguard against ministerial exception abuse. As noted by Erwin Chemerinsky, the ministerial exception is a *shield*, not a *sword*. Requiring religious institutions to adhere to due process should reduce the possibility of arbitrary and capricious action by the religious institution. Not only that, but it also ensures a level of fairness to soon-to-be unemployed ministers.

C. *Applying the Balance-of-Interests Test to Representative Cases*

1. Case One: *Hosanna-Tabor*: The Irrebuttable Presumption

Under this Note's balance-of-interests test, the ministerial exception should have barred Cheryl Perich's claim in *Hosanna-Tabor*. But not for the reasons cited by the Court.[268] The Supreme Court used

---

[261] *See* Reid v. Gholson, 327 S.E.2d 107, 113 (Va. 1985) (reasoning that Virginia courts are capable of reviewing the procedures of congregational churches because they are governed by neutral principles of law that a court is fully capable of applying).

[262] The Virginia Constitution states that religious individuals are free to "select [their own] religious instructor." VA. CONST. art. I, § 16.

[263] Cha v. Korean Presbyterian Church of Wash., 553 S.E.2d 511, 515 (Va. 2001). The court noted in dictum that attempts to limit a church's free choice of religious representation would be an impermissible burden on the church's rights. *Id.* at 514–15.

[264] *Reid*, 327 S.E.2d at 113.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] The Court noted that (1) Hosanna-Tabor held Perich out as a minister; (2) Hosanna-Tabor required Perich to work "according to the Word of God"; (3) Hosanna-Tabor periodically reviewed Perich's ministerial performance and provided her with religious education; (4) Perich's title was "Minister of Religion, Commissioned"; (5) Perich's title reflected a significant degree of religious training; and (6) Perich held herself out as a minister. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191 (2012).

the totality of the circumstances to deny Perich's claim.[269] It analyzed the functions Perich performed for the school. But only one factor should have been relevant: Perich held herself out as a minister.[270] First, Perich accepted a formal call to religious service from the church.[271] Second, after the Synod terminated her, she acknowledged her ministerial status when she stated, "I feel that God is leading me to serve in the teaching ministry. . . . I am anxious to be in the teaching ministry again soon."[272] And third, the most significant factor was that "she claimed a special housing allowance on her taxes that was available only to employees earning their compensation 'in the exercise of the ministry.'"[273]

Because Perich held herself out as a minister, an *irrebuttable* presumption should have been created against her. She acknowledged her ministerial status and benefitted from it by claiming a special tax status. She should not have been able to turn to the courts for relief when her ministerial status was no longer convenient. Therefore, under this Note's balance of interests approach, the ministerial exception should have barred Perich's claim without analyzing the position's function because she held herself out as a minister.

2. Case Two: *Mississippi College v. EEOC*: Right Result but Overly Restrictive

Second, in *Mississippi College*,[274] the court reached the right result *in that case*. But the religious institution test employed by the court was overly restrictive. Instead of focusing on the employer and employee's specific relationship, the court held that the ministerial exception could not apply to the Baptist college because it was not a church.[275] This Note's approach is not so categorical.

Mississippi College could have qualified as a religious institution in a future case. The dispute in *Mississippi College* arose between the school and an employee of the psychology department.[276] The psychology department does not perform a spiritual function. Thus, the

---

[269] *Id.* at 190.

[270] *Id.* at 191 ("Perich held herself out as a minister of the Church . . . .").

[271] *Id.*

[272] *Id.* at 192.

[273] *Id.* at 191–92. "If you are not conducting activities 'in the exercise of the ministry,' you cannot take advantage of the parsonage or housing allowance exclusion." *Id.* at 192.

[274] EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980). Although this case came before *Hosanna-Tabor*, it still serves as a useful case to illustrate the religious institution analysis under this Note's proposal.

[275] *Id.* at 485.

[276] *Id.* at 479.

court was correct. Mississippi College should not have qualified as a religious institution *in that case*. But suppose a future dispute arose between the school and an employee of the theology department. In that case, Mississippi College should qualify as a religious institution. Now the employment relationship does involve a department with a spiritual function. Therefore, this Note's balance-of-interests test does not categorically disqualify specific institutions. Each institution can demonstrate that—in *that* case—the employment relationship qualifies as a religious institution.

3. Case Three: *Cannata v. Catholic Diocese of Austin*: Employee's Rebuttal

Finally, under this Note's approach, *Cannata v. Catholic Diocese of Austin*[277] was wrongly decided. There, the court held that Cannata qualified as a minister because of his integral role in the celebration of Mass and because he furthered the church's mission.[278] He oversaw the Music Department's budget, managed the sound systems at church, rehearsed with the choir members, and played piano during services.[279] These are important spiritual functions that weigh in favor of ministerial status. And if these functions were the only factors that the court considered, the ministerial exception should bar the claim. But this Note's approach would offer Cannata an alternative.

Cannata could have demonstrated that his employer (the church) did not view Cannata as a minister. The church gave another individual liturgical responsibility because it believed that Cannata lacked the requisite education, training, and experience.[280] The church believed that Cannata was unqualified to perform vital and important religious functions.[281] Thus, Cannata could have argued that the church did not view him as a minister—as someone who performed important religious functions. On the contrary, the church denied him

[277] 700 F.3d 169 (5th Cir. 2012).

[278] *Id.* at 177.

[279] *Id.* at 171.

[280] *Id.*

[281] *Id.* Liturgy is central to Catholic faith and worship. It is not merely an accessory of religious worship. As one Catholic church puts it,

> All the worshipers are expected to participate actively in each liturgy, for this is holy "work," not entertainment or a spectator event. Every liturgical celebration is an action of Christ the High Priest and of his Mystical Body, which is the Church. It therefore requires the participation of the People of God in the work of God.

What Is "Liturgy"? Why Is It Important?, ARCHDIOCESE OF ST. PAUL & MINNEAPOLIS, https://www.archspm.org/faith-and-discipleship/catholic-faith/what-is-liturgy-why-is-it-important/ (last visited Feb. 5, 2022). Therefore, it is significant that the church did not believe Cannata was qualified to manage liturgical responsibilities.

ministerial functions because he was unqualified. Therefore, this Note's rebuttable presumption approach is fairer to employees than the current approach. It offers employees an alternative method to rebut ministerial status. Under the current approach, Cannata lost. But under this Note's balance-of-interests test, Cannata should have won.

CONCLUSION

There will always be those on both sides who disagree over the ministerial exception's merits and viability. But competing rights demand fairness. America's history is complex, and the history of religious liberty is even more so. Still, this Note seeks to demonstrate that an equitable approach to the ministerial exception is possible by reexamining its purpose. There can exist a structured approach that embraces American diversity of thought while simultaneously protecting religious liberty. Two things can be true at the same time. We can eliminate discrimination while protecting religious institutions' right to choose their ministers freely. But one thing remains clear: the status quo *cannot* continue. The ministerial exception's effect on everyday life is too substantial. The Supreme Court must refine the ministerial exception.